SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI AND INTERNATIONAL HEATER COMPANY, PETITIONERS,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WALTERS, ET AL., ETC.

No. 63

FIRST NATIONAL BANK OF CINCINNATI AND INTERNATIONAL HEATER COMPANY, PETITIONERS,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WALTERS, ET AL., ETC.

No. 64

AMY ARZT AND JOSEPHINE RAMSEY, PETITIONERS,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WALTERS, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA

Docket Entries

Oct. 5, 1931.—Bill of complaint filed.

Oct. 5, 1931.—Subpœna Issued.

Oct. 9, 1931.—Subpœna returned served on John H. Waters, Pres. of National Radiator Corp. at Johnstown on Oct. 6, 1931.

Oct. 9, 1931.—Præcipe for appearance of H. S. Enasley, for defendant filed.

Oct. 9, 1931.—Answer of defendant filed.

Oct. 9, 1931.—Decree filed & entered appointing Robert S. Waters of Johnstown, Pa., and William G. Heiner of Pittsburgh, Pa., Receivers; bond in the sum of $50,000.00 to be given.

Oct. 9, 1931.—Bond of Receivers approved by the Court & filed.

Oct. 10, 1931.—On petition of Receivers, Order entered authorizing Receivers to retain Reed, Smith, Shaw & McClay as their counsel.

Oct. 13, 1931.—On petition of Bankers Trust Company, Trustee, Order entered allowing petitioner to institute suit against National Radiator Corp. in receivership, to recover interest on debentures outstanding under the Indenture dated Aug. 1, 1927.

Oct. 19, 1931.—On petition of Receivers, Order entered authorizing receivers to deposit funds in certain bank.

Oct. 21, 1931.—On petition of Receivers, Order entered authorizing Receivers to allow certain named persons to sign checks.

[fol. 2] Oct. 23, 1931.—On petition of Receivers, Order entered fixing Dec. 31, 1931, as the last for filing claims, notice to be published.

Oct. 23, 1931.—On petition of Receivers, Order entered authorizing the Receivers to invest in Gov't securities.

Dec. 11, 1931.—Proof of publication of notice to creditors, filed.

Dec. 30, 1931.—Disaffirmance of lease filed.

Dec. 30, 1931.—Disaffirmance of lease filed.

Dec. 30, 1931.—Disaffirmance of lease filed.

Dec. 30, 1931. –Disaffirmance of leases filed.

Dec. 30, 1931.—On petition of Bankers Trust Co. Trustee Order entered allowing petitioner to institute suit at law against National Radiator Corp.

Jan. 2, 1932.—First Report of Receivers filed by leave of Court.

Jan. 4, 1932.—Receivers' disaffirmance of contract with International Exposition Co. filed.

Jan. 4, 1932.—Receivers' disaffirmance of contract with Youngstown Sheet & Tube Co. filed.

Jan. 4, 1932.—Receivers' disaffirmance of contract with Davison Coke & Iron Co. filed.

Jan. 4, 1932.—Receivers' disaffirmance of contract with Sloss-Sheffield Steel & Iron Co. filed.

Jan. 9, 1932.—On petition of Bankers Trust Co. Trustee, Order entered allowing petitioner to intervene as party plaintiff.

[fol. 3] Jan. 9, 1932.—Intervening petition (Bill to foreclose) of Bankers Trust Co. Trustee filed.

Jan. 11, 1932.—Receivers' disaffirmance of contract with Edward P. Bailey, Jr., filed.

Jan. 16, 1932.—Notice of filing intervening petition filed.

Jan. 20, 1932.—On petition of Receivers, Order entered directing that the Clerk number all Orders in this case.

Jan. 27, 1932.—On petition of Receivers, Order entered authorizing receivers to enter the proposed contract with the National Surety Co. and to issue to purchasers of goods bonds.

Feb. 1, 1932.—Affirmance of contracts filed.

Feb. 6, 1932.—Disaffirmance of lease contract filed.

Feb. 6, 1932.—Disaffirmance of contract with Central Industrial District, Inc., filed.

Feb. 8, 1932.—Affirmance of agreements with James Doherty, et al., filed.

Feb. 13, 1932.—Answer of defendant to intervening petition of Bankers Trust Co. filed.

Feb. 17, 1932.—On petition of First National Bank of Cincinnati, Ohio, Order entered granting rule on National Radiator Corp. Bankers Trust Co. and on Rudolph B. Flersheim, Charles O. Connell, John H. Waters & Frank B. Cahn to show cause why petitioner should not be permitted to intervene as party defendant, rule returnable Feb. 29, 1932.

[fol. 4] Feb. 19, 1932.—Order of Court filed & entered appointing J. King Evans of Pittsburgh, Pa., Examiner to take proofs.

Mar. 1, 1932.—Answer of Bankers Trust Co. to petition of First Nat. Bank of Cincinnati, filed.

Mar. 2, 1932.—Answer of complainants and defendant to petition of First Nat. Bank of Cincinnati filed.

Mar. 3, 1932.—Testimony of Wm. C. Meyers and Harold F. Linder filed.

Mar. 3, 1932.—Order of Court filed and entered allowing First National Bank of Cincinnati to intervene as a party defendant.

Mar. 3, 1932.—Hearing on reorganization plan and bill of complaint begun, before Gibson, J.

Mar. 4, 1932.—Hearing continued.

Mar. 4, 1932.—Trial memo filed.

Mar. 7, 1932.—Hearing continued.

Mar. 14, 1932.—Hearing concluded. Argued.

Mar. 31, 1932.—On petition of International Heater Co. Order entered allowing petitioner to intervene as a party in this suit.

Apr. 4, 1932.—Notices of Order of Mar. 31, 1932 filed.

Apr. 12, 1932.—On petition of Receivers, Order entered authorizing Receivers to pay certain taxes to the State of Ohio.

[fol. 5] May 20, 1932.—On petition of Receivers, Order entered authorizing them to retain patent counsel in the case at No. 2648 Equity.

May 31, 1932.—Opinion filed and entered holding that plaintiffs are entitled to a decree of sale.

May 31, 1932.—Final decree of sale of assets and properties of National Radiator Company filed and entered.

June 1, 1932.—Transcript of Testimony filed.

June 9, 1932.—Exception noted on the decree of sale to International Heater Co., and to First National Bank of Cincinnati.

June 11, 1932.—Receivers' Supplemental Schedule Prepared pursuant to Section 53 of the final Decree of Sale filed.

June 16, 1932.—Certified copies of decrees in the ten ancillary jurisdictions filed pursuant to Section 57 of the Final Decree filed.

June 25, 1932.—Certified copy of petition and decree of the Court of Chancery for State of Delaware, New Castle County, adopting final decree of this Court of May 31, 1932.

July 23, 1932.—On petition of First National Bank of Cincinnati and International Heater Co. Order entered allowing an appeal; appeal bond to be filed in the sum of $1,000.00.

July 25, 1932.—Citation issued returnable August 24, 1932.

[fol. 6] July 28, 1932.—Statement filed by Receivers pursuant to final decree of sale filed.

July 29, 1932.—Petition for approval of Plan & agreement dated Feb. 11, 1931 for the reorganization of National Radiator Corporation filed.

Aug. 2, 1932.—Bond on appeal approved & ordered filed.

Aug. 9, 1932.—Præcipe for appearance of Reed, Smith, Shaw & McClay for Carl E. Resley and G. Franklin Ludington filed.

Aug. 12, 1932.—Purchasers' memorandum of sale filed.

Aug. 12, 1932.—Receivers' Report of sale filed.

Aug. 17, 1932.—Petition of National Radiator Corp. a Maryland Corp. for confirmation of sale filed.

Aug. 17, 1932.—Petition of G. Franklin Ludington and Carl E. Resley purchasers, for confirmation of sale filed.

Aug. 18, 1932.—Receivers' Report on publication of notice of hearing on reorganization plan filed.

Aug. 18, 1932.—On petition of Receivers, Order entered authorizing the return of deposits to qualify bidders.

Aug. 18, 1932.—Answer of First National Bank of Cincinnati, O. and International Heater Co. to petition of complainants for approval of reorganization plan filed.

[fol. 7] Aug. 18, 1932.—Objections of First National Bank of Cincinnati and International Heater Co. to Receivers' Report of Sale filed.

Aug. 18, 1932.—Petition of Josephine Ramsey in opposition to confirmation of Receivers' Report of Sale filed.

Aug. 18, 1932.—Petition of Edward J. Ramsey in opposition to confirmation of Receivers' Report of Sale filed.

Aug. 18, 1932.—Petition of Amy Arzt in opposition to confirmation of Receivers' Report of Sale filed.

Aug. 18, 1932.—Hearing on confirmation of Receivers' sale before Gibson, J.

Aug. 18, 1932.—Order made extending return day of the Citation sur appeal to Sept. 15, 1932.

Aug. 19, 1932.—Supplemental objections of First National Bank of Cincinnati and International Heater Co. to Reorganization Plan filed.

Aug. 19, 1932.—Hearing on confirmation of sale, concluded. Argued C. A. V.

Aug. 19, 1932.—Trial memo. filed.

Aug. 24, 1932.—Præcipe for appearance of Reed, Smith, Shaw & McClay for National Radiator Co. a Maryland Corporation.

Sept. 8, 1932.—Memorandum of the Court on confirmation of sale filed.

Sept. 8, 1932.—Decree filed and entered confirming Receivers' sale and approving the deed.

[fol. 8] Sept. 8, 1932.—Transcript of testimony filed.

Sept. 13, 1932.—Motion of First National Bank of Cincinnati, O., and International Heater Co., to stay proceedings filed and Order entered refusing the motion; exception granted to the moving parties.

Sept. 14, 1932.—Order made extending return day of Citation to Sept. 30, 1932.

Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale from Supreme Court of The District of Columbia received & filed.

Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale received from the District Court of N. J. & filed.

Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale received from the District Court of Mass. & filed.

Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale received from the District Court of the Southern District of Ohio & filed.

Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale received from the District Court of the Western District of New York & filed.

Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale entered by the District Court of Western Penna. filed.

Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale received from the District Court of Maryland and filed.

Sept. 22, 1932.—Ancillary Confirmatory Decree of sale received from the Eastern District of Virginia and filed.

[fol. 9] Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale received from the Eastern District of Missouri & filed.

Sept. 22, 1932.—Ancillary Confirmatory Decree of Sale received from the Eastern District of New York and filed.

Sept. 28, 1932.—Certified copy of Decree of The Court of Chancery of The *E*state of Delaware for New Castle County confirming sale filed.

Sept. 30, 1932.—Exception of First National Bank of Cincinnati, Ohio and International Heater Co., to Decree Confirming Sale & Approving deed filed and Bill sealed.

Sept. 30, 1932.—Petition of First National Bank of Cincinnati and International Heater Co. Order entered allowing Appeal—Assignments of Error filed.

Sept. 30, 1932.—Citation issued returnable Oct. 30, 1932.

Sept. 30, 1932.—Appeal bond filed by First National Bank of Cincinnati and International Heater Co. and Order entered approving same.

Sept. 30, 1932.—Order of Court filed & entered extending return day of Citation to October 31, 1932.

Oct. 20, 1932.—Stipulation for printing of record filed.

[fol. 10] In United States District Court

Bill of Complaint—Filed Oct. 5, 1931

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, sitting in Equity:

The complainants, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, bring this their Bill of Complaint against National Radiator Corporation on their own behalf and on behalf of all other creditors of the defendant who may join in the prosecution of this suit, and allege upon information and belief as follows:

First. The complainants, Rudolph B. Flershem and Charles O. Cornell, are residents and citizens of the State

of New York; the complainant, John H. Waters, is a resident and citizen of the State of Pennsylvania; and the complainant, Frank B. Cahn, is a resident and citizen of the State of Maryland.

Second. The defendant, National Radiator Corporation, is a corporation duly organized and existing under the laws of the State of Delaware, and a citizen and resident of said State. The principal office of the defendant is in the City of Johnstown, in the Commonwealth of Pennsylvania, in the Western District of Pennsylvania, and a substantial part of the properties owned by the defendant is located in said Western District of Pennsylvania, including two manufacturing plants in said City of Johnstown, [fol. 11] a manufacturing plant in the City of New Castle and other properties and assets.

Third. The ground upon which the jurisdiction of this Court depends in this suit is the diversity of citizenship of the plaintiffs and of the defendant, and the matter in controversy in this suit is in excess of the sum of $5,000, exclusive of interest, costs and expenses. This suit is brought for the purpose of enforcing the claim of the complainants against the defendant; for the determination of the claims of the creditors of the defendant; and for the sale of the assets of the defendant and the distribution of the net proceeds of said assets among the creditors of the defendant in accordance with their respective rights and for the other relief hereinafter prayed.

Fourth. Shortly before August 30, 1927, the defendant duly authorized an issue of its 6½% Sinking Fund Gold Debentures (hereinafter called the "Debentures") in the aggregate principal amount of $16,000,000. The Debentures are coupon debentures in denominations of $1,000 and $500, dated August 1, 1927, payable August 1, 1947, and bear interest from August 1, 1927, at the rate of 6½% per annum, payable semi-annually on the 1st days of February and August in each year, upon the presentation and surrender of the interest coupons thereto attached, and are in the form or substantially the form set forth in the Indenture hereinafter mentioned. For the purpose of setting forth the terms and provisions governing the issue of the Debentures and appurtenant coupons and the rights and remedies of the holders thereof, on or about August 30, 1927, the

[fol. 12] defendant duly made and executed under its corporate seal and delivered to Bankers Trust Company, a corporation of the State of New York, as Trustee, its Indenture dated August 1, 1927 (hereinafter called the "Indenture"). At the time of the execution and delivery of the Indenture, Bankers Trust Company was duly authorized and empowered to act as Trustee thereunder and duly accepted the trusts under the Indenture and united in the Execution of the Indenture. A copy of the Indenture is hereto annexed and marked "Schedule A" and made a part of this Bill of Complaint, and complainants pray leave to refer to the same with the same force and effect as if herein set forth at length.

The Indenture was and is the proper act and deed of the defendant, was by it duly authorized, made and delivered in all respects in conformity with law and remains in full force and effect.

Fifth. After the execution and delivery of the Indenture, and on or about August 30, 1927, the defendant duly executed $12,000,000 aggregate principal amount of Debentures with all appurtenant coupons in substantially the form provided by the Indenture and said Bankers Trust Company, as Trustee, authenticated the same and delivered them to or upon the order of the defendant, all in accordance with the provisions of the Indenture.

Sixth. Thereafter the defendant duly negotiated and sold for value and issued to numerous bona fide purchasers thereof said $12,000,000 aggregate principal amount of Debentures with all coupons for interest thereunto appertaining. Of the Debentures so issued, $1,169,000 principal amount have been delivered by the defendant from time to [fol. 13] time since the execution of the Indenture and prior to the verification of this Bill of Complaint to said Bankers Trust Company, as Trustee, for cancellation in lieu of the semi-annual Sinking Fund payments provided for in the Indenture, and the Debentures so delivered have been cancelled by said Bankers Trust Company, all as provided in the Indenture.

Seventh. Of the Debentures issued as aforesaid, $126,000 principal amount have been purchased and acquired by the defendant and are now held in its treasury. At the date hereof $10,705,000 principal amount of said Debentures are

outstanding in the hands of divers persons who are the owners and holders thereof for value and said Debentures are now in all respects valid and outstanding obligations of the defendant.

Eighth. On February 1, 1931, the defendant made default in payment of the interest then falling due on all of said Debentures issued and outstanding as aforesaid, although the coupons or some thereof appurtenant to said Debentures were duly presented for payment and payment duly demanded.

Ninth. On or about February 11, 1931, the complainants, Rudolph B. Flershem, Charles O. Cornell and John H. Waters, under a Plan and Agreement of Reorganization dated February 11, 1931 (hereinafter called the "Plan and Agreement"), constituted themselves a Reorganization Committee for the purpose of effecting the reorganization of the defendant. A copy of the Plan and Agreement is [fol. 14] hereto annexed and marked "Schedule B" and made a part of this Bill of Complaint, and complainants pray leave to refer to the same with the same force and effect as if herein set forth at length. On or about September 17, 1931, the complainant, Frank B. Cahn, was duly elected a member of the Reorganization Committee as provided in Article 16 of the Reorganization Agreement with the effect in said Article 16 provided. The Plan and Agreement provides, among other things, that holders of said Debentures of the defendant may become parties to said Plan by depositing their Debentures with the February 1, 1931 and all subsequent coupons with Bankers Trust Company, as Depositary, and that such deposit of Debentures shall transfer to and vest in the Reorganization Committee the legal title to such deposited Debentures and the coupons appertaining thereto. More than $8,736,000 principal amount of Debentures have been deposited with Bankers Trust Company, as Depositary under the Plan and Agreement, together with coupons for interest on said Debentures due on February 1, 1931, and all subsequent interest dates, and the complainants are now the holders and owners of said Debentures and said coupons.

Tenth. On August 1, 1931, the defendant made default in payment of the interest then falling due on all the Debentures issued and outstanding as aforesaid, although the

coupons or some thereof appurtenant to said Debentures were duly presented for payment and payment duly demanded.

Eleventh. Shortly before the verification of this Bill of Complaint, the complainants, as the holders and owners of coupons representing interest on the Debentures due Febru- [fol. 15] ary 1, 1931, in the aggregate amount of not less than $283,920, and as the holders and owners of coupons representing interest on the Debentures due August 1, 1931, in the aggregate amount of not less than $283,920, duly presented all of said coupons for payment at the place specified for the payment thereof and duly demanded of the defendant payment thereof in full and the defendant made default in the payment of all of said coupons and the interest thereby represented and omitted and refused to pay the same or any part thereof, and the defendant is therefore at the date hereof indebted to the complainants on account of said coupons and the interest thereby represented in an amount not less than $567,840, together with interest thereon, and no part of said sum has been paid and no bond or other security has been given for the payment thereof.

Twelfth. The defendant is engaged principally in the business of manufacturing and selling heating appliances, round and sectional boilers and hot water and steam radiators. The defendant owns manufacturing plants in the Cities of Johnstown and New Castle, Commonwealth of Pennsylvania, in the Western District of Pennsylvania; in the City of Trenton, State of New Jersey, in the District of New Jersey; in the City of Framingham, Commonwealth of Massachusetts, in the District of Massachusetts; in the Cities of Dunkirk and North Tonawanda, State of New York, in the Western District of New York; and in the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division. In all of the aforesaid places the defendant owns sub- [fol. 16] stantial amounts of property, including real estate, plants, mills and warehouses, and also stocks of raw materials, goods in process and finished goods. The defendant also owns warehouses in the City of Baltimore, State of Maryland, in the District of Maryland; in the City of Cincinnati, State of Ohio, in the Southern District of Ohio, Western Division; in Washington, D. C.; and in the City of

Richmond, State of Virginia, in the Eastern District of Virginia; wherein are stored finished goods and other property of the defendant.

Thirteenth. The defendant has no means at hand with which to meet, pay or satisfy the interest charges on the Debentures overdue as aforesaid, without seriously jeopardizing the ability of the defendant to continue its business and without making it difficult or impossible for the defendant to secure necessary supplies, materials and labor to continue the operation of its plants and the sale of its products. The defendant does business and has sales offices generally throughout the United States; the sale of its products is dependent upon a feeling of confidence among its customers that its business will be continued so that repair parts will be available and servicing of its products will not cease. A large part of the property of the defendant consists of land, buildings, fixtures, plants, machinery, patterns and other equipment, trademarks and patents which are not immediately available for the payment of the indebtedness of the defendant and cannot be levied upon or converted into cash or sold except as an entirety, without great sacrifice. Certain of the properties of the defendant cannot be levied upon and sold in an action at law and said [fol. 17] properties can be sold as an entirety and as a going concern only through the intervention of a court of equity.

Fourteenth. Certain holders of the Debentures not deposited with the complainants have threatened to bring suits in respect of interest due on their coupons and may levy execution upon the property of the defendant. An attempt by the complainants to enforce their claim as a general creditor would precipitate immediate action on the part of other creditors of the defendant in different courts, and, unless this Court will take jurisdiction in this cause for the protection of every interest in the property and assets of the defendant, the result will be a multiplicity of suits, a race of diligence wasteful strife and controversy; attempts will be made to obtain judgments and priorities; levies will be made upon the working capital, materials and supplies indispensable to the operation of the business of the defendant and this will result in the dismantling and dismemberment of its properties and will greatly interfere

with and ultimately prevent the defendant from continuing to operate its properties, and will result in dissipating the administrative, technical and sales forces of the defendant, which cannot be reassembled without great cost, and in destroying the confidence of the customers of the defendant and the cancellation of many orders now on its books. The unity of the property of the defendant and its integrity as a whole, as now held and operated, the administrative, technical and sales organization and the good-will of its customers constitute most important elements of value, and to permit their severance and dissipation will result in ruin-
[fol. 18] ous sacrifice of every interest in said property, to the great loss and damage to the complainants and other creditors of the defendant. It is to the best interests of the defendant and the complainants and other creditors of the defendant that the going concern value of the defendant's business and properties should be maintained, continued and kept intact for the benefit of all creditors, until all of the assets and business of the defendant can be sold as an entirety, and the complainants believe that this can be accomplished and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a court of equity and the granting of equitable relief for the preservation of all of the property of the defendant as a going concern, and enjoining all creditors from interfering with or attempting to obtain any priorities and thus permitting a sale of all of the assets of the defendant for the benefit of all creditors.

Fifteenth. Complainants have no adequate remedy at law and no other previous application has been made for the relief herein sought.

In consideration whereof, and inasmuch as the complainants have no adequate remedy at law and can have relief only in equity, the complainants file this their Bill of Complaint, on behalf of the complainants and all other creditors of the defendant who may hereafter join in the prosecution of this suit, and pray for equitable relief as follows:

1. That the rights of the complainants and of other creditors of the defendant may be ascertained, decreed and determined; that this Court will fully administer the fund [fol. 19] in which the complainants are interested, constituting all the property and assets of the defendant,

in accordance with the rights, equities, liens and priorities, if any, existing thereon, and will enforce and decree the rights, equities, liens and priorities of the creditors of the defendant as the same finally may be ascertained and decreed by this Court.

2. That this Court, for the purpose of granting the relief prayed for and to protect the rights and interests of the complainants and of other creditors of the defendant, take over unto itself the jurisdiction and control of all the assets and property of the defendant of every kind and description whatsoever, and that pending this suit it grant such specific relief as from time to time may be expedient and appropriate to maintain such jurisdiction and control.

3. That, upon application by the complainants for the purpose of preserving the unity and integrity of the property and assets of the defendant and of preventing disruption thereof by separate executions, attachments and levies during the pendency of this suit, a receiver or receivers be appointed by this Court of the defendant and all of its property and assets, real, personal and mixed and of whatsoever kind and description and wheresoever situated, and all the tolls, earnings, rents, issues, profits, revenues and income thereof, with the usual powers of receivers in such cases, and with full power and authority to take possession of the plants, properties, real and personal, premises, easements, franchises, rights, privileges and interests of the [fol. 20] defendant of whatsoever kind and character, and to manage and operate the same and to continue the business of the defendant and to collect and receive the tolls, earnings, issues, rents, profits, revenues and income thereof and every part thereof and to apply the same as this Court from time to time may order or decree; and that such further powers and authority as to this Court may seem meet and proper may be granted by it to any receiver or receivers so appointed.

4. That the properties and assets and business of the defendant may be ordered to be sold as an entirety, with such exceptions and in such manner and upon such terms and conditions as this Court shall deem just and equitable, and that any such order shall make proper and suitable provisions for the protection of all equities, rights, priorities, claims and liens of the creditors of the defendant and

shall provide for the sale of the property, assets and business of the defendant, subject to or free and clear from any and all liens or encumbrances, and that the proceeds of any such sale may be distributed by and under the direction of this Court among the creditors of the defendant and such others, if any, as this Court may adjudicate.

5. That pending this suit an injunction may issue out of and under the seal of this Court enjoining and restraining all creditors of the defendant from levying executions upon, attaching or intermeddling with or taking possession of any of the property and assets of the defendant.

[fol. 21] 6. That the complainants may have such other, further and different relief in the premises as to this Court may seem proper and as may be necessary fully to protect and to enforce the rights and equities of the complainants and of all creditors of the defendant.

7. That a writ of subpœna may be granted to the complainants to be directed to the defendant, thereby requiring said defendant to be and appear on a certain day before this Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived and further to perform and abide by such further order, direction or decree as to this Court shall seem meet.

Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, by Maynard Teall, Their Solicitor. Milbank, Tweed, Hope & Webb, New York; Reed, Smith, Shaw & McClay, Pittsburgh, Penna., of Counsel.

[fol. 22] *Duly sworn to by Charles O. Cornell. Jurat omitted in printing.*

[fol. 23] SCHEDULE "A" TO BILL OF COMPLAINT

National Radiator Corporation

and

Bankers Trust Company, Trustee

Indenture Providing for an Issue of $16,000,000 Six and One-half per Cent Sinking Fund Gold Debentures

Dated August 1, 1927

Indenture, dated the first day of August, 1927, between National Radiator Corporation, a corporation organized and existing under the laws of the State of Delaware, having its principal office at New York City, New York (hereinafter called the Company), party of the first part, and Bankers Trust Company, a corporation organized and existing under the laws of the State of New York, having its principal office in the City of New York, New York (hereinafter sometimes called the Trustee), party of the second part:

Whereas, for the purpose of borrowing money for its lawful corporate purposes and of making payment for properties necessary for the business of the Company, and in the exercise of the lawful powers in that behalf possessed by it, the Company has duly authorized and directed the issue of its debentures of the character hereinafter described, in the aggregate principal amount of $16,000,000, [fol. 24] to be known as its "Six and One-Half Per Cent Sinking Fund Gold Debentures" (hereinafter called the debentures), to be dated August 1, 1927, to mature on August 1, 1947 (unless called for previous redemption), to bear interest at the rate of six and one-half per centum (6½%) per annum from the first day of August, 1927, and in order to provide for the payment of the debentures and for the authentication thereof by the Trustee, and to establish and declare the terms and conditions upon which the debentures are to be issued, the Company has duly authorized and directed the execution and delivery of this Indenture; and

Whereas, pending, and in anticipation of, the preparation, execution and delivery of this Indenture, the Company has heretofore issued $1,935,000 principal amount of in-

terim debentures as a part of the issue of debentures hereinabove referred to, which interim debentures are to be replaced as hereinafter provided by debentures of the form herein described; and

Whereas, the debentures and the coupons to be attached thereto and the Trustee's certificate to be endorsed thereon are to be substantially in the following forms, with appropriate omissions, insertions and variations as by this Indenture permitted:

[fol. 25] (Form of Debenture)

No. —. $—.

United States of America

State of Delaware

National Radiator Corporation

Six and One-half per Cent Sinking Fund Gold Debenture

Due August 1, 1947

National Radiator Corporation, a corporation of the State of Delaware (hereinafter called the Company), for value received, hereby promises to pay to the bearer, or, if this debenture be registered, to the registered owner hereof, on the first day of August, 1947, at the principal office of Bankers Trust Company or at the office of J. & W. Seligman & Co. in the Borough of Manhattan, The City and State of New York, or, at the option of the bearer or registered owner hereof, at the principal office of Continental and Commercial Trust and Savings Bank in Chicago, Illinois, the principal sum of — Dollars in gold coin of the United States of America of or equal to the standard of weight and fineness existing August 1, 1927, and to pay interest thereon from the first day of August, 1927, at the rate of six and one-half per centum (6½%) per annum, in like gold coin, at any of said offices, semi-annually on the first days of February and August in each year until the payment of the principal sum hereof, but, up to the date of maturity hereof, only upon [fol. 26] presentation and surrender of the interest coupons therefor hereto attached as they severally mature.

The interest on this debenture shall be paid without deduction for any Federal income tax (except such part

thereof as may be in excess of two per cent (2%) per annum of such interest) which the Company or the Trustee under the Indenture hereinafter mentioned or any paying agent may be required or permitted to pay thereon or retain therefrom under any present or future law of the United States of America; which tax the Company agrees to pay, except as above mentioned. It is provided in said Indenture that the Company will reimburse the bearer, or, if this debenture be registered, the registered owner hereof, for any Pennsylvania or Connecticut personal property tax not exceeding four (4) mills per annum, or for any District of Columbia personal property tax not exceeding five (5) mills per annum, or for any Maryland securities tax not exceeding four and one-half (4½) mills per annum, which may be legally assessed against and paid by such bearer or registered owner on each dollar of the principal amount of taxable value of this debenture, by reason of his ownership hereof, or for any income tax not in excess of six per centum (6%) per annum legally imposed by the Commonwealth of Massachusetts on account of the interest received hereon and paid by such bearer or registered owner, if application for any such reimbursement be made in writing to the Company as provided in the Indenture within sixty (60) days after payment of any such tax and in any event within six (6) months after such tax shall have become due and payable.

[fol. 27] This debenture is one of a duly authorized issue of debentures of the Company, all of like date and tenor, except as to denominations, known as its "Six and One-half Per Cent. Sinking Fund Gold Debentures", limited to an aggregate principal amount of $16,000,000, issued and to be issued under and pursuant to an Indenture (herein called the Indenture), dated August 1, 1927, executed and delivered by the Company to Bankers Trust Company (herein called the Trustee), as Trustee, to which Indenture reference is hereby made for a statement of the rights of the holders or registered owners of such debentures and coupons and of the Company and of the Trustee, and of the terms and conditions upon which the debentures are and are to be issued, received and held.

The debentures are subject to redemption, in whole, or in part by lot, at the option of the Company or from the

sinking fund hereinafter mentioned, on any interest payment date. Any redemption of debentures shall be upon at least forty (40) days' prior notice given by publication in a daily newspaper printed in the English language and published and of general circulation in the Borough of Manhattan, The City and State of New York, in the manner provided in the Indenture. The redemption price of any debentures redeemed as above provided shall be the principal amount of the debentures to be redeemed and accrued interest thereon to date of redemption, together with a premium calculated on the principal amount of the debentures to be redeemed as follows: seven and one-half per centum (7½%) if the date of redemption is on or before August 1, 1932, six per centum (6%) if the date of redemp- [fol. 28] tion is after August 1, 1932, and on or before August 1, 1937, four and one-half per centum (4½%) if the date of redemption is after August 1, 1937, and on or before August 1, 1942, and three per centum (3%) if the date of redemption is after August 1, 1942, and prior to the maturity date expressed in this debenture. From and after the date of redemption, interest on any debentures called for redemption shall cease, unless default shall be made in the redemption of such debentures on presentation. The debentures of this issue are entitled to the benefit of the sinking fund provided for in the Indenture, which sinking fund may be paid by the Company in cash or in debentures or both as provided in the Indenture.

In case an event of default, as defined in the Indenture, shall occur, the principal of all of the debentures issued thereunder and outstanding may become or be declared due and payable in the manner and with the effect provided in the Indenture.

As provided in the Indenture, debentures of the denomination of $1,000 or $500, at any time outstanding, when surrendered, and upon the payment of charges, may be exchanged for an equal aggregate principal amount of debentures of the other denomination, of numbers not contemporaneously outstanding.

This debenture is transferable by delivery unless registered as to principal in the name of the owner at the office or agency of the Company in the Borough of Manhattan, The City and State of New York, such registration to be noted hereon. After such registration, no transfer

[fol. 29] hereof shall be valid unless made at said office or agency by the registered owner in person or by duly authorized attorney, and similarly noted hereon; but this debenture may be discharged from registration by being, in like manner, transferred to bearer; and thereupon transferability by delivery shall be restored, after which this debenture may again from time to time be registered or made transferable by delivery as before. Such registration, however, shall not affect the negotiability of the coupons hereto attached, which shall always continue to be payable to bearer and to be transferable by delivery merely.

No recourse shall be had for the payment of the principal of or the interest on this debenture, or for any claim based hereon or otherwise in respect hereof or arising from the Indenture, against any incorporator, or against any past, present or future stockholder, director or officer of the Company, as such, or of any successor corporation, whether by virtue of any constitution, statute or rule of law, or by the enforcement of any assessment or penalty; all such liability being by the acceptance hereof, and as part of the consideration of the issue hereof, expressly waived and released by every holder or registered owner hereof.

Neither this debenture nor any coupon hereto attached shall be valid or become obligatory for any purpose unless and until the certificate endorsed hereon shall have been executed by the Trustee under the Indenture.

In witness whereof, National Radiator Corporation has caused this debenture to be signed in its name by its Presi-
[fol. 30] dent or a Vice-President, and its corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary, and coupons bearing the facsimile signature of its Treasurer to be hereunto attached, at The City of New York, New York. Dated August 1, 1927.

National Radiator Corporation, by —— ——, Vice-President.

Attest:

—— ——, Assistant Secretary.

(Form of Interest Coupon)

No. —. $—.

On the first day of ——, 19—, unless the debenture hereinafter mentioned shall have been duly called for previous redemption and payment duly provided therefor, National

Radiator Corporation will upon the surrender hereof, pay to bearer at the principal office of Bankers Trust Company or at the office of J. & W. Seligman & Co. in the Borough of Manhattan, The City and State of New York, or, at the option of the bearer hereof, at the principal office of Continental and Commercial Trust and Savings Bank in Chicago, Illinois, — Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness existing August 1, 1927, without deduction for Federal income taxes (except such part thereof as may be in excess of 2% per annum of such interest) as provided in the debenture hereinafter mentioned, being six months' in-
[fol. 31] terest then due on its Six and One-half Per Cent Sinking Fund Gold Debenture No. —.

—— ——, Treasurer.

(Form of Trustee's Certificate)

This is one of the debentures described in the withinmentioned Indenture:

Bankers Trust Company, Trustee, by —— ——, Assistant Secretary.

and

Whereas, all acts and things prescribed by law and by the certificate of incorporation and by-laws of the Company necessary to make the debentures when executed by the Company and authenticated by the Trustee and duly issued the valid, binding and legal obligations of the Company in accordance with their terms, and to constitute this Indenture a valid and binding agreement for the purposes and objects herein expressed, all in accordance with the terms, covenants and conditions herein contained, have been done and performed and have happened; and the execution and issue of the debentures and the execution and delivery of this Indenture have been in all respects duly authorized;

Now, therefore, this indenture witnesseth: That in order to provide for the payment of the debentures and the interest thereon, according to the true intent and meaning thereof, and in order to declare the covenants, terms and conditions upon or subject to which the debentures are to
[fol. 32] be issued, and for and in consideration of the premises and of the mutual covenants herein contained and

of the purchase and acceptance of the debentures by the holders thereof, and of the sum of One Dollar lawful money of the United States of America duly paid by the Trustee to the Company at or before the execution and delivery hereof, the receipt whereof is hereby acknowledged by the Company, the Company has executed and delivered this Indenture whereby the Company covenants and agrees with the Trustee for the equal and *pro rata* benefit (except as hereinafter in Section 2 of Article IV and Section 1 of Article V hereof expressly provided) of all present and future holders or registered owners of the debentures issued and to be issued under this Indenture, and of the coupons thereto attached, without preference, priority or distinction of any one debenture over any other debenture by reason of priority in the issue, sale or negotiation thereof, or otherwise, as follows:

Article I

Description, Execution, Exchange and Registration of Debentures

Section 1. The debentures to be issued under this Indenture and the coupons thereto belonging shall be substantially in the respective forms hereinbefore set forth, and shall be known as the "Six and One-half Per Cent Sinking Fund Gold Debentures" of the Company. The debentures shall be dated the first day of August, 1927, shall be payable on the first day of August, 1947, unless called for previous redemption; and shall bear interest from the first [fol. 33] day of August, 1927, at the rate of six and one-half per centum (6½%) per annum payable semi-annually on the first day of February and on the first day of August in each year until the payment of the principal amount thereof.

The aggregate principal amount of debentures which may be issued under this Indenture shall not exceed $16,000,000, except as provided in Section 7 of this Article with respect to lost, stolen or destroyed debentures.

* * * * * * *

Section 6. The debentures shall be negotiable and shall pass by delivery, unless registered as to principal in the

manner hereinafter provided. The Company at an office or agency to be maintained by it in the Borough of Manhattan, City and State of New York, will keep or cause to be kept books for the registration (as to principal only) and for the transfer of debentures, as provided in this Indenture.

The principal office of the Trustee in the Borough of Manhattan, City and State of New York, is hereby fixed as the office or agency of the Company, for the time being, in said Borough of Manhattan, for the registration and transfer of debentures as herein provided.

The holder of any debenture, whether temporary or definitive, may have the ownership thereof registered as to principal, at such office or agency and such registration shall be noted on the debenture. After such registration, no transfer thereof shall be valid unless made at such office [fol. 34] or agency by the registered owner in person, or by duly authorized attorney, and similarly noted on the debenture; but such debenture may be discharged from registration by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored; after which such debenture may again from time to time be registered or made transferable by delivery as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be payable to bearer and to be transferable by delivery merely, and payment therof to bearer shall fully discharge the Company in respect of the interest therein mentioned, whether the debenture be registered or not.

For any such registration or transfer of a debenture, the Company at its option may require the payment of a sum sufficient to reimburse it for a stamp tax or other governmental charge incidental thereto.

With respect to all debentures registered as to principal, the persons in whose names such debentures shall be registered shall for all purposes of this Indenture be deemed and regarded as the absolute owners thereof, and payment of or on account of the principal of any such debentures shall be made only to or upon the order of such registered owners thereof, but such registration may be changed as herein provided. All such payments shall be valid and effectual to satisfy and discharge the liability of the Company upon such debentures to the extent of the sum or

sums so paid. The Company and the Trustee and any Paying Agent of the Company may deem and treat the bearer of any debenture issued hereunder which shall not at the [fol. 35] time be registered as to principal, and the bearer of any coupon for interest on any debenture, whether such debenture be registered as to principal or not, and whether such debenture or coupon be overdue or not, as the absolute owner of such debenture or coupon, as the case may be, for the purpose of receiving payment thereof and for all other purposes whatsoever, and neither the Company nor the Trustee nor any such Paying Agent shall be affected by any notice to the contrary.

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Article II

Authentication and Issue of Debentures

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Article III

Sinking Fund and Redemption of Debentures

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Article IV

Particular Covenants of the Company

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Article V

Remedies of Trustee and Holders of Debentures

Section 1. No coupon or claim for interest belonging to any of the debentures which in any way shall have been transferred or pledged separate and apart from the debenture to which it relates shall, unless accompanied by such debentures, be entitled in case of a default under this Indenture to any benefit of or from this Indenture except after the prior payment in full of the principal of the debentures and of all coupons or claims for interest not so transferred or pledged.

[fol. 36] Section 2. In case one or more of the following events, herein termed events of default, shall happen, that is to say, in case

(a) default shall be made in the payment of any instalment of interest on any of the debentures when the same shall become payable, as therein or herein expressed; or

(b) default shall be made in the payment of the principal of any of the debentures when the same shall become due and payable, either at maturity or by declaration or otherwise; or

(c) default shall be made in the payment of any instalment of the sinking fund herein provided for when the same shall become payable; or

(d) the Company shall create, issue, sell, or assume any secured debt or obligation or lien contrary to the covenants of the Company herein; or

(e) default shall be made in the observance of any other of the covenants or agreements on the part of the Company in the debentures or in this Indenture expressed, and the Company shall not remedy such default within sixty (60) days after written notice of such default, requiring the Company to comply with the covenant or agreement in respect of which it is so in default, shall have been served upon the Company by the Trustee, which may at its discretion, and at the request of the holders of not less than one-tenth in principal amount of the debentures then outstanding shall, serve such notice; or

[fol. 37] (f) the Company shall be adjudged bankrupt or become insolvent, or a receiver shall be appointed of all or a substantial part of the property of the Company and not be dismissed within thirty (30) days after appointment; or

(g) the Company shall file a petition for voluntary bankruptcy or make a general assignment for the benefit of creditors, or shall admit in writing its inability to pay its debts as they become due; or

(h) final judgment for the payment of money shall be rendered against the Company and the Company shall not discharge the same or cause it to be discharged or a stay of execution to be procured thereon within sixty (60)

days from the entry thereof, or shall not within said period of sixty (60) days, or such longer period during which execution on such judgment shall have been stayed, appeal therefrom or from the order, decree or process upon which or pursuant to which said judgment was granted, passed or entered;

then, the Trustee may in its discretion, and, upon request in writing by the holders of at least one-fourth in principal amount of the debentures then outstanding, shall, declare the principal of and interest on all the debentures, if not already due, to be forthwith due and payable, and upon such declaration the same shall become due and payable immediately. This provision, however, is subject to the conditions that if, at any time after the principal of the debentures shall have been so declared due and payable and before the recovery by the Trustee of final [fol. 38] judgment or decree under this Indenture, all arrears of interest upon all of the debentures, with interest on overdue instalments of interest at the rate of six and one-half per centum (6½%) per annum, and all arrears of sinking fund payments with interest on overdue payments at the rate of six and one-half per centum (6½%) per annum, together with the reasonable charges and expenses of the Trustee, its agents and attorneys, shall be paid by the Company, and all other defaults under the debentures or any of them, or under this Indenture, shall be made good to the satisfaction of the Trustee, then and in such case the holders of a majority in principal amount of the debentures then outstanding, by written notice to the Company and to the Trustee, may rescind and annul such declaration and its consequences; but no such rescission or annulment shall extend to or affect any subsequent default or impair any right consequent thereon.

Section 3. In case

(a) default shall be made in the payment of any instalment of interest on any of the debentures when the same shall become payable, as therein or herein expressed; or

(b) default shall be made in the payment of the principal of any of the debentures when the same shall become due and payable, either at maturity or by declaration or otherwise; or

(c) default shall be made in the payment of any instalment of the sinking fund herein provided for when the same shall become payable;

then, upon demand of the Trustee, the Company will pay to the Trustee, for the benefit of the holders and registered [fol. 39] owners of the debentures and coupons then outstanding, the whole amount that then shall have become due and payable on all such debentures and coupons then outstanding, for interest or principal, or both, or will pay to the Trustee all payments then due in respect of the sinking fund, as the case may be, with interest in each instance at the rate of six and one-half per centum (6½%) per annum, upon the overdue principal, instalments of interest or sinking fund payments; and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Trustee, its agents, attorneys and counsel, and any expenses or liabilities incurred by the Trustee hereunder; and, in case the Company shall fail to pay the same forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid and to enforce such judgment in accordance with law.

Any moneys thus collected by the Trustee shall be applied by the Trustee as follows:

(a) to the payment of all costs and expenses of such action, including reasonable compensation to the Trustee, its agents, attorneys and counsel and to the payment of all expenses, liabilities and advances made or incurred by the Trustee hereunder;

(b) in case the principal of the debentures shall not have become due, to the payment of the interest in default in the order of the maturity of the overdue instalments of [fol. 40] such interest, with interest on the overdue instalments of interest at the rate of six and one-half per centum (6½%) per annum; such payments to be made ratably to the persons entitled thereto, without discrimination or preference, subject, however, to the provisions of Section 2 of Article IV hereof and of Section 1 of this Article; or in case of default in the payment of any instal-

ment of the sinking fund, to the payment of the sinking fund instalment so in default;

(c) in case the principal of the debentures shall have become due, to the payment of the whole amount then owing and unpaid upon the debentures for principal and interest, with interest at the rate of six and one-half per centum (6½%) per annum on the overdue principal and overdue instalments of interest; and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the debentures, then to the payment of such principal and interest, without preference or priority of principal over interest or of interest over principal or of any instalment of interest over any other instalment of interest, ratably to the aggregate of such principal and the accrued and unpaid interest; subject, however, to the provisions of Section 2 of Article IV hereof and of Section 1 of this Atricle.

The Company, for itself, its successors and assigns, covenants and agrees with the Trustee, that if by reason of the happening and continuance of any event of default aforesaid the Trustee at any time commence or institute [fol. 41] any suit or action or other legal proceeding to recover any judgment as in this Section 3 provided, it will, and its successors and assigns shall, waiving the issue and service of process, thereupon enter a voluntary appearance in such suit or action or proceeding, and consent to the entry of judgment therein for any and all amounts then remaining due and unpaid on all such debentures and coupons then outstanding, for interest or principal or both, or in respect of said sinking fund, as the case may be, and for all costs and attorneys' fees in such suit or action or proceeding, and for all other sums payable hereunder.

In the event of any bankruptcy or receivership of the Company or its properties, the Trustee is hereby irrevocably appointed the true and lawful agent and attorney of the holders and registered owners of the debentures and coupons, with full power and authority to file with any court or officer thereof proof of debt on behalf of such holders and registered owners in respect of their debentures and coupons and/or as creditors of the Company with respect thereto, and to demand, collect, receive, sue or take such other proceedings for the collection and recovery of

any sums paid or payable thereon, as the Trustee may be advised; but the Trustee shall be under no obligation with respect thereto.

Section 4. In case, upon the happening and continuance of any event of default specified in Section 2 of this Article, the Trustee shall proceed by a suit in equity or action at law, as above provided, the Trustee shall be entitled, pend-[fol. 42] ing any such suit or action, as a matter of right, to the appointment of a receiver of the Company and of all of its properties, and of the earnings, revenues, rents, issues, profits and incomes thereof.

Section 5. Upon written request of the holders or registered owners of at least one-fourth in principal amount of the debentures at the time outstanding, and upon being indemnified to its satisfaction, if the Trustee shall so require, as hereinafter provided, it shall be the duty of the Trustee to take all steps needful for the protection and enforcement of its rights and the rights of the holders or registered owners of the debentures whether by judicial proceedings or otherwise as the Trustee, being advised by counsel, shall deem most expedient in the interest of the holders or registered owners of the debentures.

Section 6. No holder of any debenture or coupon shall have any right to institute any suit, action or proceeding in equity or at law for the enforcement of any covenant or remedy contained in or given by this Indenture, unless the holders or registered owners of at least ten per cent (10%) in principal amount of the debentures then outstanding shall have given to the Trustee written notice of some event of default and of the continuance thereof for the period, if any, in Section 2 of this Article provided; nor unless the holders or registered owners of at least twenty-five per cent (25%) in principal amount of the debentures then outstanding shall have requested the Trustee in writing to take action in respect of the matter complained of, and shall have afforded to it a reasonable opportunity to institute [fol. 43] such action, suit or proceeding in its own name; nor unless also such holders or registered owners of debentures shall have offered to the Trustee security and indemnity satisfactory to the Trustee against the costs, expenses and liabilities to be incurred therein or thereby; nor unless the Trustee for thirty (30) days after receipt of

such notification, request and offer of indemnity shall have refused or neglected to act on such notification, request and offer of indemnity; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of the Trustee, to be conditions precedent to the exercise of the powers and trusts of this Indenture and to the availability and the commencement and prosecution of any action or suit or proceeding hereunder, whether for the appointment of a receiver or for any other remedy; and it is expressly declared and intended that no one or more holders or registered owners of debentures or coupons shall have any right to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder, at law or in equity, shall be instituted, had and maintained in the manner herein provided and for the equal and pro rata benefit of all holders or registered owners of such outstanding debentures and coupons.

Nothing in this Section or contained elsewhere in this Indenture or in the debentures or in the coupons attached thereto shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay the principal and interest of the debentures to the respective holders or registered owners of the debentures and to the respective holders of the coupons attached thereto, at the [fol. 44] respective due dates in such debentures and coupons stated, nor affect or impair the right of action at law, which is also absolute and unconditional, of such holders to enforce such payment by virtue of the contract contained in the debenture and not by virtue or availing of any provision of this Indenture.

Section 7. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustee, or to the holders or registered owners of debentures, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and in addition to every other remedy given hereunder or now or hereafter available at law or in equity or by statute.

Section 8. No delay or omission of the Trustee or of any holder or registered owner of debentures to exercise any right or power accruing upon any event of default shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein; and

every power and remedy given by this Indenture to the Trustee or to the holders or registered owners of debentures may be exercised from time to time and as often as may be deemed expedient by the Trustee or by the holders or registered owners of debentures.

Section 9. All rights of action under this Indenture, or under any of the debentures or coupons, may be enforced by the Trustee without the possession of any of the debentures or coupons or the production thereof on any trial or other proceeding relative thereto, and any such suit or [fol. 45] proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery of judgment shall be for the ratable benefit of the holders and registered owners of all of the debentures and coupons, except as provided in Section 2 of Article IV hereof, and Section 1 of this Article.

Article VI

Immunity of Stockholders, Officers and Directors

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Article VII

Methods of Proof

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Article VIII

The Trustee

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Article IX

Defeasance

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Article X

Concerning Consolidation, Merger and Sale

Section 1. Nothing in this Indenture contained shall prevent the consolidation or merger of the Company with or into any other corporation, or prevent any consolidation or merger with or into the Company of any other corporation, or prevent the sale by the Company of its property as an entirety; provided, however, that any such consolidation, merger or sale shall be on such terms as to preserve and not

to impair any of the rights and powers of the Trustee [fol. 46] and/or of the holders of the debentures, and that any successor corporation formed by or resulting from such consolidation or merger, or any corporation to which such sale shall be made, shall, as a part and condition of such consolidation or merger, and as a part of the purchase price for the sale of the property of the Company as an entirety, expressly assume in writing the due and punctual payment of the principal and interest of all of the debentures, and the observance and performance of all of the covenants and conditions of this Indenture, and shall, simultaneously with the consummation of such consolidation, merger or sale, or simultaneously with the delivery to it of the conveyances for the property of the Company as an entirety, if such conveyances be delivered prior to the consummation of such consolidation, merger or sale, execute and deliver to the Trustee a proper indenture, in form satisfactory to the Trustee, whereby such corporation formed by or resulting from such consolidation or merger or such corporation to which such sale shall be made shall so assume the due and punctual payment of the principal and interest of all of the debentures, and the observance of all of the covenants and conditions of this Indenture.

Section 2. In case the Company shall be so consolidated with or merged into any other corporation, or in case any corporation shall be consolidated with or merged into the Company as aforesaid, or in case of a sale of the property of the Company as an entirety, the corporation formed by or resulting from such consolidation or merger, or to which such sale shall have been made, upon executing and causing [fol. 47] to be delivered to the Trustee a proper indenture, whereby such corporation shall assume the due and punctual payment of the principal of, and the interest on, all of the debentures then or at any time thereafter outstanding, and the performance of all the covenants and conditions of this Indenture, shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as party of the first part hereto, and such corporation may thereupon, subject to the provisions hereof, cause to be signed and sealed, and may issue, either in its own name or in the name of the Company, any or all of the debentures which shall not theretofore have been signed and sealed by the Company and delivered to the

Trustee, and upon the order of such corporation, in lieu of the Company, and subject to all the terms, conditions and restrictions herein prescribed, the Trustee shall authenticate any and all debentures which shall have been previously signed and sealed by the officers of the Company and delivered to the Trustee for authentication and any debentures which such corporation shall thereafter cause to be signed and sealed and delivered to the Trustee for that purpose, and deliver the same to such corporation or upon its order signed by its President or a Vice-President and by its Secretary or an Assistant Secretary. All debentures so issued shall in all respects have the same legal security, rank and validity as the debentures theretofore or thereafter issued in accordance with the terms of this Indenture as though all of the debentures had been actually issued by the Company as of the date of the execution hereof.

[fol. 48] Article XI

Definition and Miscellaneous Provisions

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Signatures and Acknowledgments

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SCHEDULE "B" TO BILL OF COMPLAINT

Reorganization of National Radiator Corporation

Plan and Agreement Dated February 11, 1931

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Armand Erpf, 50 Broad Street, New York City, Secretary. Murray, Aldrich & Webb, 15 Broad Street, New York City, Counsel.

[fol. 49] Depositary: Bankers Trust Company, 16 Wall Street, New York City

New York, N. Y., February 11, 1931.

To the holders of 6½% sinking fund gold debentures, $7 cumulative convertible preferred stock, and common stock of National Radiator Corporation:

National Radiator Corporation (hereinafter called the "Corporation") has defaulted in the payment of the inter-

est due February 1, 1931, on its outstanding Debentures, the Board of Directors of the Corporation having reached the conclusion that, if the enterprise is to be maintained as a going concern, this interest payment must be omitted, as the continuance of business operations requires the conservation at this time of the cash resources of the Corporation.

The Corporation was formed in August, 1927, as the result of a merger of six companies. Before integration of the constituent enterprises was perfected, unfavorable competitive conditions in the industry developed, and a drastic decline in residential building construction became apparent, which has since continued. The problem has been further aggravated by the industrial depression. According to estimates of a leading authority on building statistics, expenditures for residential building construction, which is the principal outlet for the products of the Corporation, began to decline in the middle of 1928, and in 1929 [fol. 50] declined 30% as compared with 1928, and in 1930, 40% as compared with 1929.

The consolidated net earnings available for interest, after depreciation, since the merger, are reported as follows:

	1927 (four months)		1928		1929		1930*
Net earnings available for Interest, after depreciation	$993,948	(d)	587,123	(d)	490,371	(d)	740,542
Debenture Interest	271,805		756,378		743,958		713,328
Net after Interest	722,143	(d)	1,343,491	(d)	1,234,329	(d)	1,453,870
Additional charges to surplus	$222,752		658,689		51,451		

(d) Deficit.
* Tentative Figures.

The management of the Corporation has endeavored to meet these conditions, and in 1930 made substantial reductions in costs and overhead; it has been particularly concerned to maintain a liquid working capital position. The tentative balance sheet of the corporation (not consolidated) as of December 31, 1930, approved as substantially correct by Messrs. Lybrand, Ross Bros. and Montgomery, who are at present engaged in auditing the accounts of the Corporation for the year 1930, is as follows:

[fol. 51] Assets

Current Assets:		
Cash in Banks and on Hand		$1,701,899.94
Notes and Accounts Receivable, less Reserve		1,132,563.17
Inventories of Raw Materials, Finished and Semi-Finished Stocks at Book Value		2,219,544.19
		$5,054,007.30
Investments at Book Value		67,939.60
Investments in and Advances to Affiliated Companies		458,431.50
Special Deposit Under Self Insurance Law, Funds for Redemption of Underlying Bonds, etc.		32,596.69
Real Estate, Machinery, Patterns and Other Equipment, Less Reserve for Depreciation		7,050,692.59
Good Will, Trademarks and Patents		6,634,501.90
Deferred Assets and Prepaid Expenses		136,378.50
		$19,434,548.08

[fol. 52] Liabilities

Current Liabilities:		
Accounts Payable		$46,787.60
Taxes and Other Accounts Accrued		151,768.54
Accrued Interest on Debentures		293,339.58
		$491,895.72
Reserves for Redemption of Underlying Bonds, Deferred Notes Payable, etc.		92,009.35
6½% Sinking Fund Gold Debentures Due 1947, Outstanding December 31, 1930	10,831,000.00	
Less Held in Treasury	115,000.00	
		10,716,000.00

Capital Stock (Stated Value) $7 Cumulative Convertible Preferred Stock (No par value) 58,646 shares outstanding and Common Stock (No par value) 272,708 shares outstanding	10,000,000.00	
Deficit	*1,865,356.99*	
		8,134,643.01
		$19,434,548.08

While the working capital as reported is reasonably ample, it will be apparent that an increasing volume of busi- [fol. 53] ness, such as the Corporation must anticipate in order to support even the reduced service on its capitalization as readjusted under the following Plan, will require the use of a correspondingly larger amount of cash to carry larger inventories and receivables. In addition, increased expenditures for the design of new products, and for equipment necessary in their manufacture, will be essential to keep the Corporation's competitive position as against other enterprises in the industry. Moreover, the outlook for the immediate future is obscure, with no definite promise of an early recovery in earning power.

Confronted with these problems, the management of the Corporation has sought a solution of the difficulties, which would be most advantageous to the holders of the corporation's securities. It is the firm conviction of the management that a liquidation of the Corporation, either by action of the stockholders or by a forced sale at the instance of the Debentureholders, would, under present conditions, result in a very small payment to Debentureholders and other creditors and might well prove disastrous, and would, in any event, leave nothing for the stockholders. Therefore, it is the view of the management that the only proper course, under the circumstances, is to effect with all possible expedition a reorganization of the Corporation upon a basis which will provide a revised capital structure with drastically reduced fixed charges, and which will permit the employment of the liquid assets in the current conduct of the business.

To this end, the management (which includes the owners and representatives of owners of substantial amounts of [fol. 54] the Debentures and the Preferred and Common Stocks) has requested the undersigned, Rudolph B. Flershem, Charles O. Cornell and John H. Waters, to act as a Reorganization Committee to formulate and submit to the security holders a Plan of Reorganization designed to accomplish the objects recommended by the management. This Committee is in accord with the conclusions of the management as stated above, and, believing that a reorganization of the Corporation may be effectively accomplished at this time, has formulated the following Plan of Reorganization. The Committee has consulted with other holders of large amounts of the Debentures, who have approved the Plan.

The Plan is recommended by this Committee to your favorable consideration and you are urged to deposit your securities promptly, to insure that the Plan may be declared operative as soon as possible.

The Board of Directors of the Corporation and this Committee are convinced that, unless this Plan is carried out, the only alternative is liquidation which will deprive all security holders of any opportunity to participate in a revival of business following the present depression.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee.

[fol. 55]

Plan

I

Present Capitalization and Indebtedness

The capitalization of National Radiator Corporation (hereinafter called the "Corporation") as of December 31, 1930, is as follows:

	Outstanding
6½% Sinking Fund Gold Debentures due August 1, 1947	$10,716,000

The interest due February 1, 1931, on the above Debentures amounts to $348,270.

$7 Cumulative Convertible Preferred Stock without par value	58,646 shares

	Outstanding
No dividends on this Preferred Stock have been paid since August 1, 1928.	
Common Stock without par value	272,708 shares

II

The New Company

A new corporation or corporations (hereinafter called the "New Company") will be organized with such corporate name and under the laws of such State of the United States as shall be approved by the Re-organization Committee, to acquire the assets and the business of the present Corporation, subject only to such changes as may result from the ordinary course of business, and subject also to existing liens, charges and encumbrances. In so far as practicable, title to the assets and business so acquired will [fol. 56] be vested in the New Company, but in certain instances it may be deemed advisable to transfer certain of these assets to one or more subsidiary companies, whose entire capital stock (except directors' qualifying shares) will be owned by the New Company.

The capitalization of the New Company, upon the consummation of the Plan, will be approximately as follows:

	Authorized	To be presently Outstanding
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares*	272,966 shares

*Up to 90,902 shares to be reserved against the exercise of Stock Subscription Warrants.

The New Company will assume and agree to pay in full all liabilities of the Corporation for taxes, wages, services and merchandise, which have not been paid at the time of the acquisition by the New Company of the assets and business of the Corporation.

III

Description of New Securities

The following securities (hereinafter collectively called "New Securities") will be authorized by the New Company:

1. 15-Year 5% Debentures (hereinafter called the "New Debentures") will be authorized for the aggregate principal amount of $5,500,000 and will be issued to the extent [fol. 57] and upon the terms provided in the Plan. The New Debentures shall be dated March 1, 1931, shall mature March 1, 1946, and shall bear interest from their date, at the rate of 5% per annum, payable annually on March 1 in each year up to and including March 1, 1934, and payable thereafter semi-annually on March 1 and September 1 in each year, but required to be paid, prior to the maturity of the principal thereof, only as hereinafter provided out of the New Company's net earnings, as such net earnings shall be more fully defined in the Indenture under which the New Debentures are issued. The interest will be cumulative, but accumulations of interest shall not bear interest. At the maturity of the principal of the New Debentures (whether by their terms or otherwise), all arrears of cumulative interest shall be payable, whether earned or not. The net earnings of the New Company for the calendar years 1931, 1932 and 1933 shall be determined annually by the Board of Directors of the New Company, and up to 40% of such net earnings shall be available for and shall be required to be applied to the payment of the interest on the New Debentures for the first three years, that is up to and including March 1, 1934. Beginning with the calendar year 1934, and in each year thereafter, the net earnings of the New Company shall be determined semi-annually by the Board of Directors, and all of the net earnings in each such year shall be available for and shall be required to be applied to the payment of the interest on the New Debentures which is payable on September 1 in such year and on the next succeeding March 1, and to the payment of all arrears of cumulative interest. Said Indenture shall provide that no divi- [fol. 58] dends on any class of stock of the New Company shall be paid or set apart for payment unless the interest on the New Debentures payable on the next succeeding interest

date, at the full rate of 5% per annum, as well as all cumulative interest in arrears, if any, shall have been paid or set apart for payment.

The New Debentures will be issued under an Indenture to be made to a Trustee designated by the Reorganization Committee, which Indenture shall contain provisions approved by the Reorganization Committee, customary in such an instrument, including a covenant of the New Company that it will not mortgage or pledge any of its assets to secure any funded debt as defined in the Indenture, without simultaneously making provision for securing equally with such funded debt the New Debentures then issued and outstanding. The Indenture may also contain further provisions and restrictions approved by the Reorganization Committee, designed to protect the New Debentures. The New Debentures will be redeemable, as will be more fully provided in said Indenture, as a whole or in part, on any interest payment date, at 107½% of their principal amount, together with all interest accumulated and accrued thereon to the date of such redemption; but they shall not be redeemed in part so long as any accumulated interest on any of the New Debentures remains unpaid.

2. $7 Preferred Stock (hereinafter called "New Preferred Stock") will be authorized for the amount of 55,000 shares without par value, and will be issued to the extent and upon the terms provided in the Plan. The New Pre- [fol. 59] ferred Stock will be preferred both as to assets and dividends and the holders thereof will be entitled to receive on voluntary liquidation $115 per share, and on involuntary liquidation $100 per share, plus in each case accumulated and unpaid dividends. The New Preferred Stock will be redeemable as a whole or in part on any dividend date at $115 per share, plus accumulated and unpaid dividends. The holders of the New Preferred Stock shall be entitled to receive preferential dividends at the rate of $7 per share per annum, payable quarterly on January 15, April 15, July 15 and October 15 in each year, when and as declared by the Board of Directors out of funds of the New Company legally available for such dividends. Such dividends shall be non-cumulative up to and including July 15, 1934, but shall be cumulative from and after July 15, 1934, that is to say, the first cumulative dividend will be the quarterly dividend payable on October 15, 1934. It shall be a

term of the New Preferred Stock that the authorized number of shares of the New Preferred Stock shall not be increased, and that no additional shares of stock of any class ranking as to assets or dividends prior to or on a parity with the New Preferred Stock shall be authorized or issued by the New Company, without the consent of the holders of at least two-thirds in interest of the outstanding New Preferred Stock.

The holders of the New Preferred Stock shall be entitled to one vote for each share.

3. Common Stock (hereinafter called "New Common Stock") will be authorized for the amount of 400,000 shares without par value, and will be issued to the extent [fol. 60] and upon the terms provided in the Plan. 90,902 shares (or such lesser amount as may be required) of such New Common Stock will be reserved for the exercise of the Common Stock Subscription Warrants below described.

The holders of New Common Stock shall be entitled to one vote for each share.

4. Common Stock Subscription Warrants (herinafter called "Stock Warrants"), in form approved by the Reorganization Committee, will be authorized for issuance to the extent required for distribution to the Common Stockholders of the Corporation participating in the Plan. The Stock Warrants will be issued in registered form, and will grant the holder thereof the right to purchase shares of New Common Stock, at any time on or before July 1, 1941, at a purchase price of $20 per share. The Stock Warrants will be issued under an agreement which will contain provisions designed to safeguard the purchase right against dilution resulting from the issuance of additional Common Stock of the New Company, and to preserve such purchase right in the event that the New Company should merge or consolidate with one or more other corporations.

IV

Distribution of New Securities

Holders of the 6½% Sinking Fund Gold Debentures, the $7 Cumulative Convertible Preferred Stock and the Common Stock of the Corporation, who become parties to the Plan, will be entitled, upon its consummation and the

[fol. 61] surrender of their Certificates of Deposit in form transferable by delivery, to receive New Securities upon the following basis:

1. Holders of 6½% Sinking Fund Gold Debentures of the Corporation will be entitled to receive, for each $1,000 principal amount of deposited Debentures, $500 principal amount of New Debentures and 5 shares of New Preferred Stock, and 20 shares of New Common Stock.

2. Holders of $7 Cumulative Convertible Preferred Stock of the Corporation will be entitled to receive, for each share of deposited Preferred Stock, one share of New Common Stock.

3. Holders of Common Stock of the Corporation will be entitled to receive a Stock Warrant granting the right to purchase as aforesaid one share of New Common Stock for every three shares of deposited Common Stock of the Corporation, but only upon the payment to the Depositary for the account of the Reorganization Committee of the sum of $1 in cash in respect of each share of New Common Stock covered by such Stock Warrant. No payment will be required of depositors of Common Stock of the Corporation at the time of deposit or until the Plan has been declared operative and the Stock Warrants are ready for distribution. After the Stock Warrants are ready for distribution, the Reorganization Committee may fix a date on or before which such payment must be made by depositors of Common Stock, and, upon failure to make such payment within the time so fixed, such depositors will forfeit all rights under the Plan. Stock Warrants will be [fol. 62] issued only in respect of even multiples of 3 shares of Common Stock of the Corporation, and fractions arising in respect of less than 3 shares of such Common Stock will be disregarded.

V

Method of Participation

Holders of Debentures and/or Preferred Stock and/or Common Stock of the Corporation, in order to participate in the Plan, must deposit with Bankers Trust Company as Depositary, at its principal office at 16 Wall Street, in the

City of New York, on or before March 15, 1931, or such later date as may be fixed by the Reorganization Committee, their Debentures and the certificates representing their shares of such Preferred Stock and Common Stock.

Stock certificates must be properly endorsed in blank for transfer or be accompanied by proper instruments of transfer in blank. Stock transfer stamps need not be attached, unless the Certificate of Deposit is to be issued in a name other than that of the registered owner of the deposited stock, in which case New York State and Federal stock transfer stamps, each at the rate of 2¢ per share (a total of 4¢ per share), must be furnished.

Debentures registered as to principal must be transferred to bearer before being deposited; and all Debentures must be accompanied by the appurtenant interest coupons maturing on and after February 1, 1931. All references in the Plan and the annexed Agreement to Debentures shall, unless the context otherwise indicates, [fol. 63] be deemed to include said coupons.

For the convenience of depositors in forwarding their securities, the Depositary will supply a form of transmittal letter.

Depositors will be entitled to receive transferable Certificates of Deposit issued by the Depositary under the Plan and the annexed Agreement, and by the acceptance of such Certificates of Deposit, the holders thereof shall be deemed to have assented to the Plan and said Agreement and to all the terms and provisions thereof.

VI

Provisions for Declaring the Plan Operative

The Reorganization Committee in its absolute discretion may determine whether and when a sufficient amount of securities of the various classes of the Corporation shall have been deposited under the Plan to render it advisable to declare the Plan operative. The Reorganization Committee may also declare the Plan abandoned at any time, notwithstanding it may previously have been declared operative, if in the judgment of the Reorganization Committee it is inadvisable or impracticable to carry out the Plan.

VII

Modification of Plan

The Reorganization Committee may modify the Plan or adopt a substitute plan, as in the annexed Agreement provided. In the event of any such modification or substitu- [fol. 64] tion, a copy of such modified or substituted plan shall thereupon be filed with the Depositary. In case of any modification of the Plan, which in the judgment of the Reorganization Committee shall adversely affect the holders of Certificates of Deposit for securities of any class or classes to any material degree, or in case of the adoption of any substitute plan, notice of such modification or substitution shall be given and the assent thereto of holders of Certificates of Deposit for the class or classes of securities so affected shall be obtained in the manner and with the effect provided in the annexed Agreement.

VIII

Reorganization Committee and Agreement

Messrs. Rudolph B. Flershem, Charles O. Cornell and John H. Waters have consented to act as a Reorganization Committee to carry out the Plan. The Reorganization Committee shall act by a majority of its members, as provided in the annexed Agreement. The Reorganization Committee shall be entitled to compensation. The expenses of the Reorganization will include the compensation and expenses of the Reorganization Committee and of the Trustee of the 6½% Sinking Fund Gold Debentures, including the fees of their counsel, and the compensation of the Depositary. All compensation and expenses shall be determined by the Reorganization Committee, as provided in the annexed Agreement.

In furtherance of the Plan, the Reorganization Committee has executed the annexed Agreement, copies of which, [fol. 65] with the Plan, are lodged with the Depositary. The Plan and said Agreement shall be deemed and constitute one instrument and depositors under the Plan shall be bound by all the terms of said Agreement, as parties thereto. In the event, however, of any conflict between the

provisions of the Plan and said Agreement, the provisions of said Agreement shall control.

IX

Miscellaneous

The form and terms of all charters, certificates of incorporation, by-laws, debentures, indentures, certificates of stock, warrants and other securities of any corporation or corporations and of any other documents used in the Reorganization shall, in all respects not expressly defined by the Plan, be determined by the Reorganization Committee.

No fractional shares of stock of the New Company of any class will be issued and no New Debentures will be issued for less than $100 principal amount. In lieu thereof, fractional scrip may be issued in such form and on such terms and conditions as may be approved by the Reorganization Committee, and, as it may determine, such scrip may be non-dividend bearing or non-interest bearing; or a cash adjustment may be made in respect of such fractions on a basis fixed by the Reorganization Committee in its absolute discretion.

The Reorganization Committee shall have power, to be exercised in its absolute discretion, to consent to or arrange for the adjustment, by payment, settlement or purchase, of [fol. 66] any and all claims and charges of every nature whatsoever, which, in the opinion of the Reorganization Committee, should be adjusted in connection with the consummation of the Plan. The Reorganization Committee may arrange that the expense of any such adjustment shall be borne by the Corporation or the New Company; or, in its discretion, the Reorganization Committee may arrange for the participation in the Plan of any such claims or charges, and for that purpose may use any of the securities presently issuable in the Reorganization and not required for delivery to depositors. All general creditors of the Corporation, if any, other than those dealt with herein, whose claims shall be duly established, unless such claims are otherwise adjusted, shall be entitled, upon the consummation of the Reorganization, to receive new securities upon the same basis as the holders of the existing 6½% Debentures of the Corporation, upon assignment of their claims in form satisfactory to the Reorganization Commit-

tee within such period or periods as the Reorganization Committee may prescribe. All estimates of capitalization in the Plan omit consideration of any additional securities which may be issued or used for this purpose.

No estimate, statement, explanation or suggestion contained in the Plan or the Annexed Agreement or in any notice, circular or communication issued, or which may hereafter be issued, by the Reorganization Committee or by the Depositary or by the Corporation or by any of its officers or directors, is intended to be, or is to be accepted as, a representation or warranty or as a condition of deposit or assent under the Plan and said Agreement, and [fol. 67] no error, defect or irregularity herein or therein, except by written consent of the Reorganization Committee, shall release any deposit under the Plan or said Agreement or affect or release any assent hereto or affect or release any payment made or action taken pursuant hereto.

Dated February 11, 1931.

Agreement, dated February 11, 1931, between Rudolph B. Flershem, Charles O. Cornell and John H. Waters (hereinafter called the "Reorganization Committee"), parties of the first part, and such holders of the 6½% Sinking Fund Gold Debentures (hereinafter called "Debentures") and of shares of the $7 Cumulative Convertible Preferred Stock (hereinafter called "Preferred Stock") and of the Common Stock (hereinafter called "Common Stock") of National Radiator Corporation, a Delaware corporation (hereinafter called the "Corporation"), as shall conformably with the provisions of this Agreement become parties hereto in the manner hereinafter provided, and their successors in interest (hereinafter collectively called the "Depositors"), parties of the second part:

In consideration of the consent and undertaking of the Reorganization Committee to act as such in behalf of the Depositors, as hereinafter set forth, and of the mutual agreements herein contained and for other good and valuable considerations, the parties hereto agree, each of the Depositors agreeing with each of the other Depositors and with the Reorganization Committee, as follows:

[fol. 68] 1. The Depositors hereby constitute and appoint Rudolph B. Flershem, Charles O. Cornell and John H.

Waters a committee with all the powers, rights and privileges by this Agreement conferred upon the Reorganization Committee.

2. The accompanying Plan (hereinafter called the "Plan") is and shall be taken to be a part of this Agreement, with the same effect as though each and every provision thereof had been embodied herein, and said Plan and this Agreement shall be deemed and constitute one instrument.

3. Holders of Debentures and/or shares of Preferred Stock and/or Common Stock of the Corporation may become parties hereto and participants in the Plan, by depositing under the Plan with the Depositary hereinafter in Section 4 designated, on or before March 15, 1931, or such later date as may be fixed by the Reorganization Committee, their Debentures and the certificates representing their shares of such Preferred Stock and Common Stock of the Corporation (hereinafter referred to as the "deposited securities"). Debentures registered as to principal must be transferred to bearer before being deposited. Each Debenture deposited must be accompanied by the February 1, 1931 interest coupon and all subsequently maturing interest coupons appertaining thereto. Each stock certificate deposited must be properly endorsed in blank for transfer or be accompanied by a proper instrument of transfer in blank, in form approved by the Reorganization Committee. Stock transfer stamps need not be attached, the cost of any such [fol. 69] stock transfer stamps which may be required to be affixed being a part of the expenses of the Reorganization Committee under the Plan and this Agreement, except that, if the Certificate of Deposit is to be issued in a name other than that of the registered owner of the deposited stock, stock transfer stamps must be furnished as provided in the Plan. Every Depositor under the Plan who shall receive a Certificate of Deposit as hereinafter mentioned, by the acceptance of such certificate of deposit shall be deemed to have assented to and shall be bound by the provisions of the Plan and this Agreement, in the same manner and with the same effect as if he had executed the same.

The Reorganization Committee shall have full power in its discretion from time to time, either in general or in particular instances and upon such general or special terms

or conditions as it may prescribe, to extend the time for receiving deposits under the Plan and this Agreement or to accept deposits under the Plan and this Agreement after the period at any time limited for such deposits shall have elapsed or to admit as parties to this Agreement and as participants in the Plan the holders of any claims against the Corporation. Except as otherwise in the Plan provided, holders of securities of or claims against the Corporation, who do not become parties hereto in the manner hereinabove provided within the periods limited therefor, will not be entitled to become parties to the Plan and this Agreement, or to share in the benefits thereof and shall acquire no rights thereunder, except with the express consent of the Reorganization Committee, which hereby reserves the right to withhold or give such consent.

[fol. 70] The Reorganization Committee may in its absolute discretion permit the holder of any Debentures and/or shares of Preferred Stock and/or Common Stock of the Corporation and/or any creditor of the Corporation to become a party to the Plan and this Agreement, without the actual deposit of his securities or claim, and any such party to the Plan and this Agreement shall be embraced within the term "Depositors," whenever used in the Plan or in this Agreement.

4. Each Depositor will receive from the Depositary hereinafter mentioned a Certificate or Certificates of Deposit, registered in the name of the Depositor or in the name of his nominee, and specifying the securities deposited and the amount thereof and otherwise in such form as shall be approved by the Reorganization Committee.

The Reorganization Committee hereby appoints Bankers Trust Company as its Depositary, with authority to said Depositary to appoint one or more agents to act under this Agreement in its behalf. The Depositary shall keep at its office books (which shall be deemed books of the Reorganization Committee) and shall record in such books the names and addresses (as furnished) of all persons to whom Certificates of Deposit are issued by such Depositary and shall likewise record in such books all transfers of Certificates of Deposit made by such Depositary.

The interests represented by the respective Certificates of Deposit issued under the Plan and this Agreement shall be transferable, subject to the terms and conditions of the

[fol. 71] Plan and this Agreement on the books of the Reorganization Committee by the holders thereof in person or by duly authorized attorney, upon surrender of such Certificates of Deposit properly endorsed, and accompanied by stock transfer stamps required by law. Thereupon a new Certificate or Certificates of Deposit, registered in the name of the transferee, shall be issued. Each transferee of any Certificate of Deposit shall be deemed to be a Depositor and shall be a party to this Agreement and as such be entitled to the same rights and privileges and in every way be as fully bound by and subject to the Plan and this Agreement as the original Depositor.

Title to Certificate of Deposit, when properly endorsed, shall be transferable, to the extent permitted by law, with the same effect as in the case of negotiable instruments. Each holder of a Certificate of Deposit by the acceptance thereof shall be deemed to consent and agree that the delivery by any bearer thereof of such Certificate of Deposit, properly endorsed in blank, shall vest the title thereto and all rights and interests represented thereby in the transferee, to the same extent for all purposes as would delivery under like circumstances of a negotiable instrument payable to bearer, provided, however, that the Depositary and the Reorganization Committee may treat the holder of record of any Certificate of Deposit (or, when presented properly endorsed in blank, the bearer thereof) as the absolute owner thereof for all purposes, and shall not be affected by any notice to the contrary.

The Reorganization Committee may make provision for the replacement of any Certificate of Deposit which shall be lost, stolen, mutilated, or destroyed.

[fol. 72] 5. The Reorganization Committee is hereby authorized and empowered to construe the Plan and this Agreement, and the construction placed upon the same by the Reorganization Committee, in good faith, shall be final and conclusive and binding. The Reorganization Committee may supply any defect or omission in the Plan and this Agreement and reconcile any inconsistencies therein and herein.

6. Each and every Depositor of Debentures does hereby and by such deposit, for himself and not for any other Depositor, sell, assign, transfer and set over to the Reorgan-

ization Committee, as joint tenants and not tenants in common, and to the survivors or survivor of them and to their successors and assigns, each and every Debenture and coupon deposited hereunder or subject hereto or represented by a Certificate of Deposit, the Depositor of which shall in any manner have assented to the Plan and this Agreement, as well as such Depositor's right, title, interest, property and claim, at law or in equity, by virtue of said Debenture or coupon or of the Indenture under which the same are issued, or otherwise, against the Corporation and in and to its property and assets, to the end that the Reorganization Committee as from time to time constituted is vested under the terms of the Plan and this Agreement, as trustees of an express trust, with the legal title to all said Debentures and the coupons appertaining thereto which shall be deposited hereunder, and shall have all the rights and powers of owners thereof, both before and after the Plan and this Agreement shall become or be declared operative. At any time, upon the request of the Reor- [fol. 73] ganization committee, each and every Depositor will promptly execute and deliver any and all further or additional assignments, powers of attorney or other instruments which the Reorganization Committee may in its discretion deem necessary or proper effectually to vest in it full and complete ownership of the deposited Debentures and coupons or to carry out any of the purposes of the Plan and this Agreement. All of the deposited Debentures and coupons shall be received and held by the Depositary subject to the written order of the Reorganization Committee. The Reorganization Committee in its discretion, as the owners and holders of the deposited Debentures, may cause the same or any of them to be registered in the name of the Reorganization Committee or in the name of its nominee or nominees.

7. The deposit of certificates for shares of Preferred Stock and Common Stock of the Corporation shall not constitute an assignment or transfer thereof, but the title to such shares shall remain in the respective Depositors thereof unless and until the Reorganization Committee shall elect to take title thereto and shall cause said shares to be transferred into its name or into the name of its nominee or

nominees, whereupon title to said shares shall vest in the Reorganization Committee, as joint tenants and not tenants in common, and in the survivors and survivor of them and in their successors and assigns, or, at the election of the Reorganization Committee, in its nominee or nominees, as trustees of an express trust. The Depositors of certificates for shares of the Preferred Stock and Common Stock of the Corporation severally agree that, at any time when the [fol. 74] Reorganization Committee shall have elected to take title to said shares, they will execute and deliver any and all further transfers and assignments or other writings requested by the Reorganization Committee in order more effectively to vest the ownership of said shares in the Reorganization Committee or in its nominee or nominees. Unless and until the Reorganization Committee shall so take title thereto, any and all directions to the Depositary respecting any such shares of stock and the possession and/or any and all disposition by the Reorganization Committee of them or action in respect of any of them shall be as the irrevocable agent and attorney-in-fact of the Depositors. Without electing to take title to such shares of stock, the Reorganization Committee, as such agent and attorney-in fact of the Depositors, may cause said shares to be transferred into the name of one or more nominees.

8. Each and every Depositor hereby authorizes and requests the Reorganization Committee, as the Depositor's agent and attorney-in-fact, to endeavor to carry out the Plan and this Agreement, in the manner set forth in the Plan and this Agreement, and for this purpose the Reorganization Committee is empowered hereby to exercise all the rights of the Depositors with respect to the deposited securities. The methods to be employed, however, by the Reorganization Committee in carrying out the Plan and this Agreement shall be entirely discretionary with the Reorganization Committee and the Plan and this Agreement are in all respects to be liberally construed, so as to enable the Reorganization Committee to carry into effect the in- [fol. 75] tent and purposes of the Plan. Without prejudice to the general power and authority so granted, the Depositors hereby severally and irrevocably authorize and empower the Reorganization Committee, and at the election of the Reorganization Committee, either before or after the Plan and this Agreement shall become or be declared op-

erative: To take or institute or cause to be taken or instituted such actions or proceedings, legal or otherwise, to give such directions, to execute such papers and to do or cause to be done such acts and things as the Reorganization Committee may consider necessary or advisable, in order to enforce or to procure the payment of any of the deposited securities, or to protect the rights and interests of the Depositors, or for any of the purposes of the Plan and this Agreement; to demand, receive and collect all moneys that may be due and owing in respect of any deposited Debentures, whether for principal or interest or otherwise; to give any notice or to make any demand upon or request of the Trustee under the Indenture under which the deposited Debentures are issued; to declare or cause to be declared due and payable the principal of any and every Debenture deposited hereunder or of the entire issue of Debentures of which they form a part and to revoke or annul any such declaration or to cause the same to be revoked and annulled; to request and direct or to give consent, assent and/or approval to any action by said Trustee in any manner in which the request, demand, consent, assent or approval of the owners or holders of the Debentures or any portion thereof may be required, permitted or appro- [fol. 76] priate under the provisions of the aforesaid Indenture; to indemnify said Trustee against any and all costs, expenses and outlays, counsel fees and other proper disbursements and any other liability growing out of the compliance by said Trustee with any request or demand upon said Trustee for the protection and enforcement of its rights and the rights of the holders of said Debentures, and to charge the deposited Debentures as Security for such indemnity; to call or waive notice of and to attend in person or by proxy or substitute proxy any and all meetings of creditors or stockholders (but as the holder and owner of the deposited shares, if the Reorganization Committee shall have taken title thereto, or otherwise, as the attorney-in-fact and proxy of the Depositors of said shares) and to vote or cause to be voted or to consent with respect to any or all of the deposited securities of any class or classes, in any manner and for any purpose deemed by the Reorganization Committee to be advisable for the purpose of carrying out the Plan and this Agreement; from time to time, and upon such terms as the Reorganization Committee may determine, to borrow or otherwise obtain

money for any of the purposes of the Plan or of this Agreement and to charge or pledge any deposited securities, any property acquired by the Reorganization Committee pursuant to the provisions of the Plan or of this Agreement, or any new securities to be issued, for the payment of any moneys borrowed or indebtedness or liability incurred; to direct in writing the Depositary for any securities, to hold the securities deposited with it, and any other property as security for the repayment of any moneys borrowed or to be borrowed, in accordance with this Agreement, in which [fol. 77] case such securities and other property shall be, and shall be held by such Depositary as, security for such advance, with the same effect as if they were actually deposited with the person making such advance; to intervene in or to become a party to or to exercise control over any suits or proceedings in which the Depositors of securities of any class or classes are or may be interested or which in the judgment of the Reorganization Committee may affect the property of the Corporation or of any of its subsidiary companies or the rights or interests of the Depositors; to apply for or join with others in applying for or to consent to the appointment or removal of a receiver or receivers of the Corporation, or of any or all of the properties of the Corporation or of any of its subsidiary companies, to do whatever, in the judgment of the Reorganization Committee, may be necessary to promote or to procure a sale or sales of any property herein concerned wherever situated; to adjourn the sale of any property or any portion thereof at discretion; to bid for and to purchase either directly or through nominees or through a new corporation or corporations any or all of the properties of the Corporation or of any of its subsidiary companies; to hold any property purchased by the Reorganization Committee, either in its name or in the name of its nominee or nominees, and to apply any deposited securities or any property acquired by the Reorganization Committee under the provisions of the Plan or of this Agreement in satisfaction of any bid or towards obtaining funds for the satisfaction thereof. The amount to be bid or paid by the Reorganization Committee for any property, shall be absolutely discretionary [fol. 78] with it. The Reorganization Committee is authorized to procure the organization of such new corporation or corporations (hereinafter sometimes referred to as the "New Company") or to adopt or use any existing or future

corporation or corporations for such purpose; to make or cause to be made, in respect of the New Company or of the Corporation or of any of its subsidiary companies such consolidations, purchases, sales or other arrangements as in the judgment of the Reorganization Committee may be advisable; to form or to procure the formation of any syndicate or syndicates, of which the Reorganization Committee or any member or members thereof, acting alone or in association with others, may be a participant or participants and/or the manager or managers for the promotion or the financing of new securities of the New Company; to cause to be listed upon any stock exchange any of the Certificates of Deposit and any of the new securities contemplated by the Plan, and to pay any costs and expenses incident thereto; to execute and deliver such documents as shall be required for any of the purposes of the Plan and this Agreement, and in general to do such acts and take all and singular such proceedings as in the absolute discretion of the Reorganization Committee shall seem to it necessary or advisable for the protection of the rights and interests of the Depositors.

Any action contemplated in the Plan or authorized by this Agreement may be taken or performed whenever the Reorganization Committee in its uncontrolled discretion shall deem the same advisable. Any such action may be taken by the Reorganization Committee or at its instance, [fol. 79] at any time when the Reorganization Committee shall deem the Reorganization advanced sufficiently to justify such action, and the Reorganization Committee, as it may deem necessary or expedient, may defer or permit to be deferred the performance of any provision of the Plan or of this Agreement or may commit such performance to the New Company and may cause the New Company to pay or assume any indebtedness or liabilities authorized or incurred by the Reorganization Committee or otherwise in furtherance of the Plan, or to make or assume any obligation which, in the judgment of the Reorganization Committee, may be necessary or expedient to carry out the Plan and this Agreement.

9. The Reorganization Committee shall have power, to be exercised in its absolute discretion, to consent to or arrange for the adjustment by payment, settlement or purchase of any and all claims and charges of every nature

whatsoever, which, in the opinion of the Reorganization Committee, should be adjusted in connection with the consummation of the Plan. The Reorganization Committee may arrange that the expense of any such adjustment shall be borne by the Corporation or by the New Company; or, in its discretion, the Reorganization Committee, as provided in the Plan, may arrange for the participation in the Plan and under this Agreement of any such claims or charges. The Reorganization Committee may employ counsel, depositaries, agents and all necessary assistants and may delegate any power or authority as well as discretion; and may incur and discharge any and all expenses which it deems reasonable for the purposes of the Plan or for [fol. 80] carrying out or attempting to carry out the same, as well as all expenses in connection with the preparation of the Plan and this agreement, the issue of Certificates of Deposit and the issue and transfer of securities, the listing on exchanges of Certificates of Deposit, legal expenses, expenses for advertising and printing, all organization and other expenses of the New Company, and all other expenses in any manner connected with the Plan and this Agreement or which, in its uncontrolled discretion, the Reorganization Committee may deem it expedient to incur in promoting the purposes of the Plan. The Reorganization Committee shall be the sole judge of the propriety or expediency of any and all expenses and the amounts thereof. The members of the Reorganization Committee shall be entitled to compensation for their services and such compensation, in the amount fixed as proper by the Reorganization Committee, shall be binding and conclusive on all parties. For their compensation, expenses, indebtedness, obligations and liabilities, the Reorganization Committee shall have a lien upon all the deposited securities and upon all property securities and cash acquired in the course of the Reorganization and until their delivery or distribution, upon the new securities contemplated by the Plan. The Reorganization Committee may provide that such compensation, expenses, indebtedness, obligations and liabilities or any portion thereof, shall be paid by the Corporation or be assumed and paid by the New Company.

10. The Reorganization Committee, in its absolute discretion, may determine whether and when a sufficient [fol. 81] amount of securities of the various classes shall

have been deposited under the Plan and this Agreement to render it advisable to declare the Plan operative.

11. The Reorganization Committee shall have power, at any time either before or after the Plan shall have been declared operative, to modify the Plan and/or this Agreement or any part thereof or to adopt a substitute plan, and any such modification or substitute plan shall bind and conclude the Depositors; provided, however, that, if in the judgment of the Reorganization Committee the proposed modification shall adversely affect the holders of Certificates of Deposit of any class to a material degree, or if any substitute plan shall be adopted, the Reorganization Committee shall file with the Depositary a statement of the modification or of the substitute plan, as the case may be, and shall give, in the manner provided in Section 15 hereof, notice of the fact of such filing. In case the Reorganization Committee shall give notice of any modification which shall be so deemed adversely to affect to a material degree the holders of Certificates of Deposit of any class, or of any substitute plan, then, within 30 days after the date of the first publication of such notice, the holders of Certificates of Deposit of such class may, upon the terms and conditions set forth in Section 12 hereof, withdraw the securities represented by their Certificates of Deposit. Every such Depositor not so withdrawing within said 30 days' period, shall be irrevocably and conclusively deemed to have assented to the proposed modification or substitute plan and shall be bound and concluded thereby as effectively as if he had assented thereto [fol. 82] in writing. The modifications or substitute plan so adopted by the Reorganization Committee shall become a part of the Plan and of this Agreement, and all provisions and references concerning the Plan shall apply to the Plan so modified or to such substitute plan. Any modification of the Plan or this Agreement shall be deemed to affect adversely to a material degree the holders of all Certificates of Deposit, unless the Reorganization Committee, by the unanimous action of all its members, shall otherwise determine.

The Reorganization Committee may abandon the Plan, at any time either before or after the same shall have been declared operative (notwithstanding anything, that may have been done), if in its judgment the Reorganization

Committee shall deem it inadvisable or impracticable to carry the same into execution. Such abandonment shall be effected by resolution of, or written instrument signed by, the Reorganization Committee, and notice shall be lodged with the Depositary, and given in accordance with the provisions of Section 15 hereof. Thereafter, any Depositor may, subject to the provisions of Section 12 hereof, withdraw the deposited securities or the avails thereof then under the control of the Reorganization Committee, represented by his Certificate of Deposit. In the absence of such notice of abandonment, no Depositor may withdraw the deposited securities (or the avails thereof) represented by his Certificate of Deposit or withdraw from this Agreement prior to January 1, 1932. If the Plan shall not have been declared operative by that date, the Plan shall [fol. 83] be deemed to have been abandoned and any *Director* may thereafter withdraw the deposited securities (or the vails thereof) represented by his Certificate of Deposit. The abandonment of the Plan shall not affect any previous acts or obligations done or undertaken by the Reorganization Committee.

12. Any Depositor, as a condition precedent to his exercise of a right of withdrawal of deposited securities (or the avails thereof) under any provision of the Plan or this Agreement, shall surrender to the Depositary his Certificate of Deposit, with a properly executed transfer thereof, and shall pay to such Depositary for the account of the Reorganization Committee (a) such taxes as may be imposed upon the transfer or delivery of the securities withdrawn; and (b) in the case of a holder of a Certificate of Deposit for deposited Debentures of the Corporation, the pro rata share of such Depositor, as determined in the sole and unrestricted discretion of the Reorganization Committee, of the compensation, expenses, indebtedness, obligations and liabilities of the Reorganization Committee incurred to the date of such withdrawal.

The Reorganization Committee, subject to the provisions of this Agreement, is authorized and empowered to make reasonable regulations as to the procedure to be followed by holders of Certificates of Deposit in withdrawing, in any of the events aforesaid, the securities of the class represented by their Certificates of Deposit, and for the purpose of facilitating delivery of such securities the Reor-

ganization Committee may order the books for the transfer of Certificates of Deposit to be permanently closed [fol. 84] against the making of transfers upon a date not less than 10 days after giving notice of such closing of the books to the Depositors in accordance with the provisions of Section 15 hereof.

13. The Reorganization Committee, subject to the provisions of this Agreement, is authorized and empowered to prescribe terms and conditions as to the surrender of Certificates of Deposit, with which holders of Certificates of Deposit must comply in order to receive the securities deliverable to Depositors under the Plan, and for the purpose of facilitating the delivery thereof the Reorganization Committee may order the books of the Reorganization Committee for the transfer of Certificates of Deposit to be permanently closed against the making of transfers at a date not less than 10 days after giving notice of such closing of the books to the Depositors in accordance with the provisions of Section 15 hereof.

The accounts of the Reorganization Committee shall be filed with the Board of Directors of the New Company within one year after its organization shall have been completed, unless a longer time be granted by said Board. The accounts, when approved by such Board of Directors and until disapproved by said Board, shall be final, binding and conclusive upon all parties having any interest therein, and upon approval thereof by such Board of Directors the Reorganization Committee shall be discharged.

Every holder of a Certificate of Deposit, by the surrender thereof to the Reorganization Committee and the re- [fol. 85] ceipt of the securities represented by his surrendered Certificate of Deposit or securities deliverable to him hereunder, shall be deemed to have released and discharged the Reorganization Committee, the Depositary and all other persons from all liability and accountability of any and every kind hereunder.

After the books for the transfer of Certificates of Deposit shall have been closed against the making of transfers (whether upon the consummation of the Plan or upon its abandonment), the Reorganization Committee, whenever there shall be lodged with the Depositary,

(a) in case the Plan shall have been consummated—the securities of the New Company which Depositors shall be entitled to receive under the Plan and this Agreement, or

(b) in case the entire Plan shall have been abandoned—the securities of the Corporation (or the avails thereof then under the control of the Reorganization Committee) represented by the outstanding Certificates of Deposit,

may instruct the Depositary to hold the securities of the New Company or the securities of the Corporation (or the avails thereof then under the control of the Reorganization Committee), as the case may be, so lodged with it for the holders of outstanding Certificates of Deposit, and to distribute the same to such holders upon surrender to it of their Certificates of Deposit and the payment by them of such amounts, if any, as may be payable by reason of the provisions of Section 12 hereof; and, such securities having been so lodged with the Depositary and [fol. 86] such instructions having been so given, the Reorganization Committee shall be under no responsibility to the Depositors, and the rights of the Depositors shall be limited to receiving from the Depositary such securities so held by the Depositary.

14. All securities and claims deposited under the Plan and this Agreement, or acquired by the Reorganization Committee under any of the provisions hereof, shall remain in full force and effect for all purposes and shall not be deemed to have been merged, satisfied, released or discharged by any delivery of new securities, and no right or lien shall be deemed to be released or waived, but said securities and claims, and any judgment upon any of such securities or claims, and all liens and equities shall remain unimpaired and may be enforced by the Reorganization Committee or by the New Company, or by any other assignee of the Reorganization Committee, until paid or satisfied in full or expressly released. Neither the Reorganization Committee nor any security holder or other creditor of the Corporation, by executing this Agreement, or by becoming parties hereto, release, surrender or waive any lien, right or claim whatsoever, and all such liens, rights or claims shall vest unimpaired in the Reorganization Committee and its assigns or successors in interest; and any purchase or purchases, by or on behalf of the Reorganiza-

tion Committee or its nominees, under any decree for the enforcement of any such lien, right or claim, shall vest the property purchased in the Reorganization Committee or its nominees, free from all interest or claim on the part of any security holder or creditor of the Corporation, or any other parties.

[fol. 87] Neither the Reorganization Committee nor the Depositary is to be under any obligation, legal or equitable, express or implied, to any holder of securities of any class of or claims against the Corporation who shall not deposit the same hereunder, or to any person whomsoever, other than Depositors. With respect to the Depositors, the Reorganization Committee undertakes to endeavor in good faith to carry out the Plan and this Agreement, but neither the Reorganization Committee nor any member thereof nor the Depositary assumes any responsibility for the carrying out of the Plan and this Agreement or for the result of any steps taken or acts done for the purpose thereof. Neither the Reorganization Committee nor any member thereof nor the Depositary shall be liable for any act or omission of any attorney, agent or employee, or for anything except for his or its own willful misconduct.

No estimate, statement, explanation or suggestion, contained in the Plan or in the preliminary statement prefixed thereto or in this Agreement or in any document, circular letter, notice or communication now or hereafter issued or published by or on behalf of the Reorganization Committee, is intended or is to be taken as a representation or as an inducement or a condition of any deposit or assent or payment under the Plan or this Agreement; and no error or defect or irregularity herein or therein shall release any Depositor or affect or release any deposit under the Plan and this Agreement or assent thereto and hereto or payment made or anything done thereunder or hereunder, except with the written consent of the Reorganization Committee.

[fol. 88] Any member of the Reorganization Committee or any corporation, association or partnership of which any member of the Reorganization Committee may be an officer, director, member or partner, or the Depositary or any officer or director of the Depositary, may be or become pecuniarily interested in any Debentures, stock, Certificates of Deposit, subscription rights, contracts, securities,

property or matters with which the Plan or this Agreement is concerned, and may participate in any underwriting syndicate as syndicate manager, syndicate subscriber, or otherwise, and may be an officer or director of the Corporation and/or of the New Company. The Depositary may be trustee under any indenture or agreement created or entered into in connection with the Plan, or otherwise act in any manner for the Corporation and/or the New Company.

15. Any notice required or permitted by the provisions hereof to be given to any Depositor shall be conclusively deemed to have been duly given if published in a newspaper of general circulation in the City of New York once in each of four successive calendar weeks, in each instance in any such newspaper and on any day of the week; and such publication shall be sufficient for all purposes whether or not actually brought to the notice of any Depositor. Any Depositor may furnish an address to the Secretary of the Reorganization Committee to which notices may be mailed and to each such Depositor the Reorganization Committee will mail, postpaid, a copy of any such notice within 5 days after the date of the first publication thereof, but failure so to mail such notice to any such Depositor shall not affect [fol. 89] any proceedings taken pursuant to notice given by publication as aforesaid.

16. The Reorganization Committee, as from time to time constituted and notwithstanding any vacancy, shall have all the powers, rights and interests of the Reorganization Committee as named in this Agreement. The Reorganization Committee shall appoint from its members a Chairman, and may appoint a Secretary (who may, but need not, be one of its members) who shall keep a record of its acts and proceedings.

The Reorganization Committee may from time to time add to its number by electing an additional member or additional members, and the additional member or members so elected shall have all the rights, powers and authorities of members of the Reorganization Committee, and together with those named therein, or their successor or successors, shall constitute the Reorganization Committee under this Agreement, with like force and effect as if they were specifically herein named.

Any member of the Reorganization Committee may resign by filing written notice of his resignation with its Chairman or Secretary. In case at any time a vacancy shall occur in the Reorganization Committee by death or resignation, or from any other cause, such vacancy may, but need not, be filled by a majority of the members remaining. Notices of changes in the membership of the Reorganization Committee signed by the Chairman or Secretary of the Reorganization Committee and filed with the Depositary shall bind all parties hereto.

[fol. 90] A majority of the members of the Reorganization Committee shall constitute a quorum for all purposes, and, except as herein otherwise expressly provided, all the powers of the Reorganization Committee may be exercised by a majority of its then members. The Reorganization Committee may act at a meeting, or in writing or by telegraph, wireless or cable without a meeting. A member of the Reorganization Committee by written proxy may authorize any person (who may, but need not, be another member of the Reorganization Committee) to act in his place for any and all purposes. The certificate of the Chairman or Secretary as to any action by the Reorganization Committee shall be conclusive upon and full protection to the Depositary and all other persons, and conclusive upon all Depositors, as to all acts and things so certified to have been done by the Reorganization Committee.

17. The deposited securities and all moneys paid to the Depositary under this Plan and Agreement shall be held and disposed of by the Depositary in accordance with the orders of the Reorganization Committee, and the Depositary shall incur no liability for anything done or permitted to be done at the request or direction of the Reorganization Committee. The Depositary shall be bound to exercise only reasonable care in the safekeeping of the deposited securities and of any other securities or cash which may be deposited with or held by it hereunder respectively, and to deal therewith in accordance with the directions of the Reorganization Committee.

The Depositary, by the delivery of any Certificate of Deposit hereunder, does not make any representation or [fol. 91] warranty of any sort whatsoever other than that it agrees to use its best judgment and good faith in the performance of its duties hereunder, and by the acceptance of

any such Certificate of Deposit every holder expressly relieves the Depositary of any liability except as aforesaid.

The Depositary may resign by filing written notice of such resignation with the Chairman or Secretary of the Reorganization Committee, and the Reorganization Committee shall have power to appoint a new Depositary. In the event of the resignation of the Depositary, such Depositary shall deliver all cash, securities, property and records held by it hereunder as directed by the Reorganization Committee.

18. The enumeration of specific powers herein conferred upon the Reorganization Committee shall not be construed to limit or to restrict general powers herein conferred or intended so to be, and it is hereby declared that it is intended to confer upon the Reorganization Committee in respect of all deposited securities and in all other respects any and all powers which the Reorganization Committee may deem expedient for carrying out or promoting the purposes of the Plan and this Agreement in any respect, even though any such power be apparently of a character not now contemplated; and the Reorganization Committee may exercise any and every such power as fully and effectively as if the same were herein distinctly specified and as often as for any reason it may deem expedient.

19. The Plan and this Agreement shall bind and benefit the several parties hereto, and each and all the survivors, [fol. 92] heirs, executors, administrators, successors and assigns of said parties, and of each of them. The rights of the Depositors shall be such only as are conferred by the Plan and this Agreement and shall be subject to compliance by the Depositors with the terms and conditions set forth therein and herein. The term "Depositors" shall include every party to the Plan and this Agreement and the holder for the time being of any Certificate of Deposit issued hereunder and thereunder and shall include the singular as well as the plural number.

20. This Agreement may be executed in several counterparts and all such counterparts shall be taken together as forming one instrument. Upon the execution of this Agreement by the members of the Reorganization Committee or a majority of them, an executed counterpart shall be deposited with the Depositary.

In witness whereof the members of the Reorganization Committee have executed this Agreement, and the Depositors have become parties hereto by depositing their securities hereunder and under the Plan as above set forth, all as of the date first above written.

Rudolph B. Flershem, Charles O. Cornell, John H. Waters, Reorganization Committee.

[fol. 93] IN UNITED STATES DISTRICT COURT

ANSWER—Filed Oct. 9, 1931

To the Honorable the judges of said court:

In answer to the Bill of Complaint in the above entitled case, National Radiator Corporation, the defendant above named, admits the truth of the allegations therein contained, joins in the prayers thereof, and consents to the appointment of a receiver or receivers as therein prayed for.

This answer is filed pursuant to a resolution of the Executive Committee of said defendant corporation adopted at a meeting the Committee duly called and held on the 8th day of October, 1931, a certified copy of the said resolution being annexed hereto.

National Radiator Corporation. Chas. L. Crouse, Vice-President. Attest: Carl E. Resley, Secretary. (Seal.) H. S. Endsley, Johnstown, Pennsylvania, Solicitor for the Defendant.

Whereas, a bill of complaint has been filed in the District Court of the United States for the Western District of Pennsylvania by Rudolph B. Flershem, et al. as a Reorganization Committee, Complainants, against National Radiator Corporation, Defendant, praying inter alia for the appointment of receivers of all the property and assets [fol. 94] of the corporation for the protection of the creditors of the corporation, and a subpœna in such action has been duly served upon this corporation; and

Whereas, the corporation has been advised that ancillary bills of a similar character will be filed in other jurisdictions throughout the United States where this corporation owns properties; and

Whereas, it is the judgment of the Executive Committee of the corporation that it is for the best interests of the creditors and stockholders of the corporation that receivers be appointed as aforesaid;

Now, therefore, resolved, That H. S. Endsley, Esquire, be authorized to enter an appearance for this corporation in said proceeding and that the answer of the corporation to the bill of complaint be executed on behalf of the corporation by any executive officer under the corporate seal attested by the secretary, and filed, admitting the truth of the allegations contained in the bill and joining in the prayers thereof, and consenting to the appointment of a receiver or receivers for the corporation;

Further resolved, That H. S. Endsley, as counsel, is hereby authorized to select counsel in the various jurisdictions where any such ancillary bills may be filed, and to authorize and instruct counsel so selected to appear and to file on behalf of the corporation in any and all such ancillary causes answers similar to the answer hereby authorized to be filed in the principal cause in the Western District of Pennsylvania.

[fol. 95] Further resolved, That the officers of the corporation and H. S. Endsley, its counsel, are hereby authorized to do, or cause to be done, all such acts and things, and to execute, sign, and file all such papers, as may be necessary to carry out the intent of the foregoing resolutions.

Certificate

I, the undersigned, —— —— Secretary of National Radiator Corporation, do hereby certify that the foregoing is a true and correct copy of recitals and resolutions adopted by the Executive Committee of said corporation at a meeting of the Committee duly called and held in the City of Johnstown, Pennsylvania, on the eighth day of October, 1931.

Carl E. Resley, Secretary. (Seal.)

In United States District Court

Decree Appointing Receiver—Filed Oct. 9, 1931

And now, to wit, this 9th day of October, 1931, this matter came on to be heard on bill and answer, and upon con-

sideration thereof, on motion of counsel for complainants, the defendant appearing and consenting thereto, it is ordered, adjudged and decreed as follows:

First. The defendant, National Radiator Corporation, being presently unable to meet and discharge its obligations [fol. 96] which have already matured, without seriously jeopardizing the ability of the defendant to continue in business, it is to the interest and advantage of the creditors and stockholders of the defendant that a Receiver be appointed for all its assets.

Second. That Robert S. Waters of Johnstown, Pa. and William G. Heiner of Pittsburgh be and hereby are appointed Receivers of all and singular, the lands, tenements and hereditaments of the defendant and all its real and personal property, business, rights, estates, and effects whatsoever, wheresoever the same may be situate, including its merchandise, stocks and bonds, choses in action, bills and accounts receivable, cash in hand and in bank, and all its easements, franchises, rights, privileges, and interests, and all of the tolls, earnings, rents, issues, profits, revenues and income thereof and every part thereof.

Third. The said Receivers are hereby authorized to take possession of all and singular the property, business, assets and effects above described or referred to, wheresoever situate, and until further order of this Court, said Receivers shall manage and control said property and shall preserve the property, assets and effects in proper condition and repair so that they may safely and advantageously be used and shall fully protect the same and employ such persons and make such payments and disbursements as may be necessary or proper for so doing, and shall report their actions to this Court from time to time.

Fourth. The said Receivers shall have full power to demand, sue for and collect, receive and take into their pos- [fol. 97] session, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the defendant and to institute suits at law or in equity for the recovery of any assets, property damages or demands existing in favor of said corporation, and in

their discretion to compound and settle with any debtors of said corporation, with persons having possession of its property or in any way responsible at law or in equity to said corporation at the time of this appointment or afterwards, upon such terms and in such manner as they may deem just and beneficial to said corporation. Said Receivers are hereby further authorized to intervene in and become a party to such suits, actions and proceedings, at law or in equity, including ancillary proceedings in state or federal courts, as may, in their judgment, be necessary or proper for the protection, maintenance or preservation of the receivership estate, or any part thereof, or in aid of the decrees or orders entered or made by this Court, and to apply to any such court for any such order or orders as may be deemed by them necessary or proper.

Fifth. It is further ordered, adjudged and decreed that the defendant and each of its officers, agents, directors and employees be, and they are hereby required to transfer, convey and turn over to the Receivers, or their duly constituted agent, all of the real and personal property, business, assets and effects above described or referred to, and all of the property and assets of the defendant, and all [fol. 98] books, papers and other personal property belonging to the defendant in their or its hands or subject to their or its control.

Sixth. It is further ordered that the defendant, its agents, directors, officers, servants and employees and all other persons, be and they are hereby enjoined and restrained from in any way levying upon, attaching, selling, disposing, transferring or in any manner interfering with any of the property of the defendant or from taking possession of or in any way interfering with any parts thereof or from in any manner disturbing or interfering with the possession or management of any part of said property over which the said Receivers are hereby appointed, and doing any act or thing to prevent the discharge by said Receivers of their duties under this decree.

Seventh. Until the further order of this Court, said Receivers shall continue to carry on the business of the National Radiator Corporation, the defendant, to continue the manufacture and sale of its products, to dispose of its stock on hand, make such purchases as may be necessary

to enable it to carry on its business, complete such contracts and orders of the defendant as in the judgment of the Receivers may be advantageous and for the best interests of the defendant and its creditors, and make, accept, and carry out such new contracts and orders as in their judgment may be advisable; and said Receivers are further vested with full discretion in the matter of handling the present business of the defendant and any new business which may be [fol. 99] taken and accepted by them and to handle the same in accordance with the customs of the business and the trade in which the defendant is engaged. Said Receivers shall have full power and authority to sell and discount negotiable instruments of customers or customers' invoices and to endorse the same.

Eighth. Said Receivers are hereby authorized, in their discretion, from time to time to pay out of the funds coming into their hands all expenses of operating the plants and carrying on the business of the defendant, and to pay the current and unpaid payrolls and all taxes and assessments upon the properties of the defendant, or any part thereof.

Ninth. Said Receivers shall be, and hereby they are, allowed four months from the date of this decree (unless the time be extended by further order of this Court) within which to elect to adopt or continue in force, or to refuse to adopt or continue in force, any lease or other contract of whatsoever character not fully performed which may be included in the property or assets of the defendant or which shall have been entered into by the defendant. Said election may be made from time to time and shall be made by an instrument in writing subscribed by said Receivers and filed in the office of the Clerk of this Court, and no conduct or uses of the rights by said Receivers or payments made or received by them, as rent or otherwise, or any other acts or omissions of said Receivers within said period of four months unaccompanied by the filing of such written instrument shall be deemed to conclude said Receivers in respect [fol. 100] of such election or be deemed to constitute an election to adopt or to continue in force any such contract, lease or agreement.

Tenth. Said Receivers shall open books of account and shall keep, or cause to be kept, therein due and proper accounts of all earnings, expenses, receipts and disburse-

ments of and with respect to the properties and assets in their possession or under their control, the conduct of said business and the conduct or carrying on of any other business or undertaking which said Receivers hereby are or hereafter shall be authorized to conduct or carry on; shall preserve proper vouchers for all payments made by them on account thereof; and shall deposit all funds coming into their hands in such banks as shall be selected by them and approved by this Court.

Eleventh. The right is reserved to the parties hereto or to any and all other parties in interest, to apply to this Court for any other instructions to said Receivers, and the Court reserves the full right and jurisdiction to make from time to time such further orders, amplifying, extending, limiting or otherwise modifying this decree, as to it may at any time seem proper, and in all respects and at all times to regulate and control the conduct of said Receivers.

Twelfth. In case of the death, resignation or inability of the Receivers hereby appointed, or either of them, and the appointment of a successor or successors, the provisions of this decree shall be applicable to such successor or successors from and after his or their said appointment without further order of this Court and with like effect as if [fol. 101] such successor or successors were herein specifically named as said Receiver or Receivers.

Thirteenth. Said Receivers shall, before entering upon the discharge of their duties, file a bond, with a surety to be approved by this Court, in the sum of Fifty Thousand ($50,000.00) Dollars, conditioned for the faithful discharge of their duties as such Receivers.

Per Curiam.

G.

IN UNITED STATES DISTRICT COURT

PETITION OF BANKERS TRUST CO. FOR LEAVE TO FILE SUIT, ETC.—Filed Oct. 13, 1931

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, sitting in equity:

The petition of Bankers Trust Company respectfully show to the Court as follows:

1. Your petitioner is a corporation duly organized and existing under the laws of the State of New York, having its principal office and place of business in the City, County and State of New York, and is a citizen of said State and a resident of the Southern District of New York.

2. The defendant, National Radiator Corporation, is a corporation organized and existing under the laws of the State of Delaware, and is a resident and citizen of said State of Delaware.

[fol. 102] 3. Shortly before August 30, 1927, the defendant, National Radiator Corporation, duly authorized an issue of its 6½% Sinking Fund Gold Debentures, and, for the purpose of setting forth the terms and provisions governing the issue of said Debentures and to define the nature and extent of the rights of the holders and owners thereof, on or about August 30, 1927, said defendant duly made and executed, under its corporate seal, and delivered to your petitioner its Indenture, dated August 1, 1927; and said defendant thereafter made and executed Debentures of the issue hereinabove described in the aggregate principal amount of Twelve Million Dollars ($12,000,000). All of said Debentures were duly authenticated by your petitioner, as Trustee under said Indenture, in all respects as therein provided, and all of said Debentures were duly issued by said defendant for a valuable consideration, and Ten Million Six Hundred and Seventy-three Thousand Dollars ($10,673,000) principal amount of said Debentures are now outstanding in the hands of divers persons who are owners and holders thereof for value.

4. Your petitioner is now Trustee under said Indenture.

5. On October 9, 1931, an order was entered by this Honorable Court in the above entitled cause, appointing Robert S. Waters and William G. Heiner, Receivers of the defendant, National Radiator Corporation, and of all and singular its property and assets of every kind and description and wheresoever situated; and the defendant, National Radiator Corporation, consented to such appointment of Receivers.

[fol. 103] 6. The defendant, National Radiator Corporation, has made default in the payment of the interest due on February 1, 1931, and August 1, 1931, on all of its said

Debentures outstanding as aforesaid. Said default constitutes an event of default under said Indenture, and said default has not been remedied but still continues.

7. Said Indenture provides, among other things, that, in case default shall be made in the payment of any instalment of interest on any of said Debentures when the same shall become payable as therein or in said Indenture expressed, then, upon demand of the Trustee, the defendant Corporation will pay to the Trustee, for the benefit of the holders and registered owners of said Debentures and coupons then outstanding, the whole amount which then shall have become due and payable on all such Debentures and coupons then outstanding, for interest or principal or both, with interest in each instance at the rate of six and one-half per centum (6½%) per annum upon the overdue amounts; and, in case the defendant Corporation shall fail to pay the same forthwith upon such demand, the said Trustee, in its own name and as Trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid and to enforce such judgment in accordance with law.

8. On October 9, 1931, your petitioner, pursuant to the provisions of said Indenture, duly made due demand upon the defendant, National Radiator Corporation, that it pay forthwith to your petitioner, as Trustee under said Indenture, for the benefit of the holders of the coupons rep- [fol. 104] resenting the interest due and payable on February 1 and August 1, 1931, on each and all of said defendant's 6½% Sinking Fund Gold Debentures, now outstanding, the entire amount which had so become due and payable on said Debentures for said interest represented by said coupons due February 1 and August 1, 1931, with interest on the overdue instalments of such interest at the rate of six and one-half per centum (6½%) per annum from the date on which the same became due, but said defendant has failed to pay to your petitioner the amount so demanded or any part thereof.

9. Your petitioner is entitled, by reason of the events hereinbefore set forth, and desires in its own name and as Trustee of an express trust, to institute a suit in this Court to recover judgment for the whole amount due and unpaid

as aforesaid, representing interest on said Debentures so outstanding.

Wherefore your petitioner prays leave of this Honorable Court to file suit and institute proceedings against the defendant in receivership, to recover judgment for the whole amount due and payable as aforesaid, and that an order granting such leave may be made by this Honorable Court and entered in the above entitled cause, and that your petitioner may have such other and further relief as may be just and proper.

Bankers Trust Company, by H. F. Wilson, Jr., Vice-President. J. Garfield Houston, Solicitor for Petitioner.

[fol. 105] *Duly sworn to by H. F. Wilson, Jr. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PETITION OF BANKERS TRUST CO.—Filed Oct. 13, 1931

Upon reading and filing the petition of Bankers Trust Company, as Trustee under the Indenture dated August 1, 1927, made by National Radiator Corporation, for leave to file suit and institute proceedings against National Radiator Corporation in receivership, to recover judgment for the whole amount due and payable, representing interest on the Debentures outstanding under the aforesaid Indenture, as stated in said petition, and for other relief, and it appearing that the parties hereto have consented thereto, [fol. 106] Now, on motion of the solicitor of the petitioner, and the Court being fully advised in the premises, it is hereby

Ordered, that the prayer of said petition be and the same hereby is granted and that leave is hereby granted to Bankers Trust Company to file suit and institute proceedings in this Court against National Radiator Corporation in receivership, to recover judgment for the whole amount due and payable, representing interest on all of the Deben-

tures outstanding under said Indenture, as stated in said petition, and for other relief as therein prayed against the said defendant.

Dated October 13, 1931.

Per Curiam.

S.

The undersigned hereby admit due and timely notice of the filing and presentation of the annexed petition of Bankers Trust Company and hereby waive all further notice of the hearing or application thereon, and admit the truth of all the allegations of said petition and consent to the entry of the foregoing order.

Dated October 13th, 1931.

J. Garfield Houston, Solicitor for the Complainants. H. F. Endsley, Solicitor for the Defendant. Reed, Smith, Shaw & McClay, Solicitors for Robert S. Waters and William G. Heiner, Receivers.

[fol. 107] In United States District Court

Petition for Order Fixing Time for Filing Claims and Publication of Notice in Regard Thereto.—Filed Oct. 23, 1931

To the Honorable the Judges of said Court:

The petition of Robert S. Waters and William G. Heiner, Receivers, respectfully represents:

1. Petitioners, Robert S. Waters and William G. Heiner, were appointed Receivers for the defendant, National Radiator Corporation, by decree of this Court made October 9, 1931. Leave is asked to refer to said decree with like effect as if the same were herein set forth at length.

2. On the 9th day of October, 1931, the petitioners duly qualified as Receivers by filing bond in the sum of $50,000 approved by this Court.

3. No order has as yet been made by this Court providing for the filing of claims against the defendant corporation or for the publication of notice to creditors as to time and place for filing such claims.

Wherefore the petitioners pray that the Court will now enter such order as it may deem proper providing for the time and place for the filing of claims by creditors and providing further for the publication of notice to creditors as to the time and place for filing such claims.

Robert S. Waters, William G. Heiner, Receivers, by Maynard Teall, of Counsel for the Receivers. [fol. 108] Reed, Smith, Shaw & McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania, Attorneys for Petitioners.

Duly sworn to by Maynard Teall. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER FIXING TIME FOR FILING CLAIMS, ETC.

And now, this 23rd day of October, 1931, the foregoing petition presented in open court by Reed, Smith, Shaw & McClay (Maynard Teall of counsel), attorneys for Robert S. Waters and William G. Heiner, Receivers, and upon con- [fol. 109] sideration thereof it is ordered:

(1) All persons, firms, associations and corporations having any claim against the defendant, National Radiator Corporation, or having or asserting any title to or lien against or interest in the property or estate of the defendant, are required to file with the Receivers at their office in Johnstown, Pennsylvania, on or before December 31, 1931, duly sworn statements of their respective claims and demands verified before any officer authorized to administer oaths by the laws of the State where such statement is made, setting forth the nature of the claim, the amount thereof, the amount and nature of any security or lien held by the claimant, or to which the claimant is or claims to be entitled, and also any claim to preference or priority in payment to any other creditors of the defendant herein.

(2) The filing by Bankers Trust Company, as Trustee under the Indenture dated August 1, 1927, between National Radiator Corporation and Bankers Trust Company, as Trustee, of a claim for the whole amount of the prin-

cipal and interest which at the time of the filing of the said claim shall be due and unpaid upon all the 6½% Sinking Fund Gold Debentures of National Radiator Corporation, issued under said Indenture, and then outstanding, shall be sufficient filing pursuant to the terms hereof of the claims of the holders of said Debentures.

(3) All persons, firms, associations and corporations who shall fail so to file their claims against the defendant, [fol. 110] National Radiator Corporation, with the Receivers on or before December 31, 1931, shall be forever barred and foreclosed from making or asserting any claim against the defendant herein in any manner whatsoever and from participating in the assets or property of the defendant or the proceeds thereof, except on further order of the Court herein granted and entered for due cause shown, upon proper application.

All claims and demands which are allowed by said Receivers shall, unless the Court shall hereinafter otherwise determine, be deemed to have been proved, but all claims and demands not allowed by said Receivers, shall be proved before a Special Master hereafter to be appointed pursuant to such orders and directions in respect thereof as may hereafter be made by the Court.

(4) The Receivers shall cause a notice to be published once in each of three (3) successive calendar weeks, the first publication to be made not later than November 10, 1931, in a newspaper of general circulation in each of the following named cities, to wit: Pittsburgh, Pa., Trenton, N. J., Boston, Mass., New York, N. Y., Buffalo, N. Y., Chicago, Ill., Baltimore, Md., Richmond, Va., Cincinnati, Ohio, and Washington, D. C., and to be mailed not later than November 16, 1931, to each and every creditor of the defendant known to the Receivers or appearing as such on the books of the defendant, addressed to each such creditor at his last known address, directing and requiring all creditors of the defendant to file their duly sworn state- [fol. 111] ments of claims against the defendant with the Receivers within the period hereby prescribed.

Said notice shall be in substantially the following form:

National Radiator Corporation

Notice to Creditors

Pursuant to the provisions of an order of the United States District Court for the Western District of Pennsylvania entered on October 23rd, 1931, in the cause therein pending entitled "Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants, against National Radiator Corporation, Defendant," in Equity No. 2558, all creditors of National Radiator Corporation, the defendant in said cause, are hereby required to file duly sworn written statements of their respective claims against said Corporation with the undersigned Receivers appointed by said United States District Court, at their office in Johnstown, Pa., on or before December 31, 1931. Such statements of claims, among other things, shall set forth the nature of the claim, the amount thereof, the amount and nature of any security or lien held by the claimant or to which the claimant is or claims to be entitled, and also any claim to preference or priority in payment to any other creditors of said Corporation. Pursuant to the further provisions of said order, all persons, firms, asso-
[fol. 112] ciations and corporations who shall fail so to file their statements or demands against the defendant corporation with the Receivers, on or before said date, shall be forever barred and foreclosed from making or asserting any claim against National Radiator Corporation and from participating in the assets or property of said Corporation or the proceeds thereof, except upon the further order of the Court herein granted and entered for due cause shown, upon proper application.

Dated —— —, ——.

——— ——, Receivers.

If and to the extent that this order shall be adopted by the order of any other court, reference to such order of such other court may be incorporated in said notice.

Per Curiam.

G.

In United States District Court

Petition of Bankers Trust Company for Leave to Bring Suit—Filed Dec. 30, 1931

To the Honorable Judges of the District Court of the United States for the Western District of Pennsylvania:

The petition of Bankers Trust Company (hereinafter called "Petitioner"), respectfully shows to the Court:

[fol. 113] 1. Petitioner is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business at No. 16 Wall Street, City, County and State of New York, and is a citizen of said State and a resident of the Southern District of New York.

2. The defendant, National Radiator Corporation (hereinafter called the "Company") is a corporation duly organized and existing under the laws of the State of Delaware and is a resident and citizen of said State.

3. Shortly before August 30, 1927, the Company, being thereunto duly authorized and empowered by law, duly authorized an issue of its 6½% Sinking Fund Gold Debentures and for the purpose of setting forth the terms and provisions governing the issue of said debentures and to define the nature and extent of the rights of the holders and owners thereof, the Company, on or about August 30, 1927, duly made and executed under its corporate seal and delivered to your Petitioner as Trustee, its Indenture dated August 1, 1927. Your Petitioner duly joined in the execution thereof to evidence its acceptance of the trust thereby created and has continuously, since the date thereof, acted as Trustee under said Indenture and is still so acting.

4. The Company thereafter duly made and executed debentures of the issue hereinabove described, in the aggregate principal amount of Twelve Million dollars ($12,000,000). All of said debentures were duly authenticated [fol. 114] by Petitioner as Trustee, in all respects as provided in said Indenture, and all of said debentures were duly issued for a valuable consideration.

5. Ten Million Six hundred seventy-three thousand dollars ($10,673,000) principal amount of said debentures are

now outstanding in the hands of divers persons who are bona fide owners and holders thereof for value.

6. The Company has made default under the terms and provisions of Article V, Sections 2 and 3 of the Indenture as follows:

(a) It wholly failed to pay the installment of interest due February 1, 1931 and said interest installment remains unpaid although duly demanded.

(b) It wholly failed to pay the installment of interest due August 1, 1931 and said interest installment remains unpaid although duly demanded.

(c) On or about the 9th day of October, 1931, an order was entered by this Court, in this cause, appointing Robert S. Waters and William G. Heiner, Receivers of the defendant, National Radiator Corporation, and of all and singular its property and assets of every kind and description and wheresoever situated. Such order was entered upon the consent of the Company and the Receivers appointed thereby have not been dismissed within thirty days after their appointment. Said defaults constitute events of default under the Indenture and said defaults have not been remedied and still continue.

[fol. 115] 7. By leave of this Court first duly had and obtained, your Petitioner, as Trustee, as aforesaid, instituted its action at law in this Court for and in behalf of all and singular the holders of debentures and coupons for the amount of the February 1, 1931 and August 1, 1931 coupons and on October 13, 1931, judgment was duly entered in said action (No. 6776-Law) in favor of your Petitioner and against the Company in the sum of Seven hundred thirteen thousand nine hundred forty-four and 38/00 dollars ($713,944.38). Said judgment has not been satisfied, nor has any part thereof been paid, although duly demanded.

8. Section 2 of Article V of said Indenture provides, among other things, that in case default shall be made in the payment of any installment of interest on any of said debentures when the same shall become payable, as therein, or in said Indenture expressed, then the Trustee may, in its discretion and upon request in writing by holders of at least one-fourth in principal amount of the debentures then

outstanding, shall declare the principal and interest on all the debentures, if not already due, to be forthwith due and payable and upon such declaration, the same shall become due and payable immediately. Pursuant to said Article, your Petitioner did, on the 24th day of December, 1931, upon the written request of more than one-fourth in principal amount of the outstanding debentures, duly declare the principal of and interest on all the debentures to be immediately due and payable and upon such declaration, the same did become forthwith due and payable.

[fol. 116] 9. Section 3 of Article V of said Indenture provides, among other things, that in case default shall be made in the payment of any installment of interest on any of the debentures or in the payment of principal of any of the debentures when the same shall become due and payable, either at maturity or by declaration, or otherwise, then upon demand of the Trustee, the Company will pay to the Trustee for the benefit of the holders and registered owners of said debentures and coupons then outstanding, the whole amount which shall then have become due and payable upon the debentures and coupons and under the Indenture, for interest or principal, or both, with interest in each instance at the rate of 6½% per annum upon the overdue amounts and in case the Company shall fail to pay the same forthwith upon such demand, Petitioner, in its own name and as Trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid and to enforce such judgment in accordance with law.

10. On December 28th, 1931, your Petitioner, pursuant to the provisions of the Indenture, duly made demand upon the Company that it pay forthwith to your Petitioner, as Trustee, for the benefit of the holders and registered owners of the debentures and coupons then outstanding, the principal and interest then due and payable on each and all of said debentures and coupons, with interest on the overdue amounts, at the rate of 6½% per annum from the dates on which the same became due, but the Company has wholly failed to pay to your Petitioner the amount so de-
[fol. 117] manded, or any part thereof and the same remains wholly due and unpaid. There is also due to your Petitioner, pursuant to the terms of said Indenture, its

reasonable compensation and expenses, including counsel fees in administration of its trust, with interest thereon at 6½% per annum. Your Petitioner does not, at this time, seek judgment for the amount of such compensation and expenses since, upon information and belief, further amounts will become due and payable at a later date.

11. By reason of the premises, your Petitioner is entitled and desires in its own name and as Trustee of an express trust, to institute a suit in this Court to recover judgment for the additional amounts which have become due and payable since October 13, 1931 and are now due and unpaid as aforesaid, representing the principal amount of the outstanding debentures with interest thereon from August 1, 1931.

12. By reason of the order of this Court dated October 9, 1931 hereinabove alleged, Petitioner is unable, save as herein sought, to enforce the remedies provided in said Indenture.

Wherefore your Petitioner respectfully prays of this Honorable Court:

(a) leave to file suit and institute proceedings against the defendant, National Radiator Corporation in receivership, to recover judgment for the whole amount due and payable as aforesaid and for that purpose to file in this Court its statement of claim in substantially the form submitted herewith;

[fol. 118] (b) that an order granting such leave may be made by this Honorable Court and entered in this cause without prejudice to the right of Petitioner later to apply for leave to institute another suit or suits for amounts hereafter becoming due under the Indenture and for such other and further relief as to the Court may seem just; and

(c) that the judgment duly entered October 13, 1931 in this Court, in favor of Petitioner against the Company in the sum of Seven Hundred Thirteen Thousand Nine Hundred forty-four and 38/100 dollars ($713,944.38), for interest due and payable on coupons appertaining to said Company's outstanding debentures, and such judgment as Petitioner may obtain against the Company, pursuant to the leave herein sought, be declared to stand as a claim duly

filed and allowed by the Receivers now appointed and acting in this cause.

Bankers Trust Company, as Trustee, by J. Garfield Houston, Its Solicitor. White & Case, of Counsel.

Duly sworn to by H. F. Wilson, Jr. Jurat omitted in printing.

[fol. 119] Consent

The undersigned hereby admit due and timely notice of the filing and presentation of the annexed petition of Bankers Trust Company and hereby waive all further notice of the hearing or application thereon, and admit the truth of all the allegations of said petition and consent to [fol. 120] the entry of the foregoing order.

Dated December 30th, 1931.

Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for the Complainants. H. F. Endsley, Solicitor for the Defendant. Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for Robert S. Waters and William G. Heimer, Receivers.

In United States District Court

Order Granting Petition of Bankers Trust Co.—Filed Dec. 30, 1931

And now this 30th day of December, 1931, this cause came on further to be heard, upon the petition, verified the 28th day of December, 1931, of Bankers Trust Company, as Trustee under the Indenture dated August 1, 1927, made by National Radiator Corporation, by which petition it appears that pursuant to the terms of said Indenture the principal amount of the debentures outstanding has become due and payable by declaration; that payment of the same, together with the amount of the judgment heretofore obtained in the sum of $713,944.38, with interest upon both amounts, as alleged in said petition, has been duly demanded, and that no part thereof has been paid; and said petition having been filed in this Court and counsel having [fol. 121] been heard and it appearing that the parties

hereto have consented to the relief prayed for in said petition;

Now, on motion of the solicitor of the Petitioner, and the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the prayer of said petition be and hereby is in all respects granted; that leave be and hereby is granted to Bankers Trust Company, as Trustee as aforesaid, to institute its action at law, in its own name, as Trustee of an express trust, for and on behalf of all and singular the holders and registered owners of the debentures and coupons outstanding for the sum of $10,673,000, being the principal amount of said debentures outstanding, with interest thereon at 6½% per annum from August 1, 1931 to December 24, 1931 and with interest on said total sum at 6½% per annum from December 24, 1931 to the date of judgment, without prejudice to the right of said Bankers Trust Company, as Trustee, to apply to this Court at a later date for leave to institute another suit or suits for any other amounts which may now be or hereafter become due and payable upon the said debentures and/or the coupons appurtenant thereto and/or under the said Indenture; and that the judgment duly entered October 13, 1931 in this Court in favor of Petitioner against the defendant National Radiator Corporation in the sum of $713,-944.38, for interest due and payable on coupons appertaining to said debentures outstanding, together with such judgment as the Petitioner may obtain pursuant to the [fol. 122] leave hereby granted, be and hereby is declared to stand as a claim duly filed and allowed by the Receivers in this cause; provided, however, that neither Bankers Trust Company nor any other person shall take any action in any manner to make said judgment of October 13, 1931, or any judgment that may be obtained pursuant to the leave hereby granted, a lien upon any property of the defendant National Radiator Corporation.

Per Curiam.

G.)

IN UNITED STATES DISTRICT COURT

FIRST REPORT OF ROBERT S. WATERS AND WILLIAM G. HEINER, RECEIVERS OF NATIONAL RADIATOR CORPORATION—Filed Jan. 2, 1932

To the Honorable the Judges of said Court:

Robert S. Waters and William G. Heiner, appointed on October 9, 1931, as receivers of the above named National Radiator Corporation, submit the following first report of their activities as such receivers:

1. On October 9, 1931, pursuant to decree of this Court entered on said date at the above number, said Robert S. Waters and William G. Heiner duly qualified as receivers of National Radiator Corporation and took possession of all the assets and property (except as hereinafter stated) of said National Radiator Corporation as said assets and property were on the date of said decree. An inventory, [fol. 123] and appraisement at book value, of said assets and property is hereto annexed and made part hereof.

The property of said corporation of which said receivers did not take possession is an item of $10,000.00 in cash on deposit at First National Bank, Cincinnati, Ohio. Said item appears on sheet 229 of 235 of said inventory. On demand of the receivers that said deposit be paid or credited to them, said First National Bank refused to comply, on the ground that it was the holder of $68,000.00 par value of said National Radiator Corporation's 6½% Sinking Fund Gold Debentures, due 1947, and of due and unpaid interest coupons appertaining thereto in the sum of $2,210.00 due February 1, 1931, and the further sum of $2,210.00 due August 1, 1931, which overdue and unpaid coupons, in the aggregate sum of $4,420.00, were an offset to said deposit. On the 8th day of December, 1931, the United States District Court for the Southern District of Ohio, Western Division, in Flershem et al., as the Reorganization Committee, etc., v. National Radiator Corporation, In Equity No. 779, adjudicated that the amount of said interest coupons was an offset as claimed, and said court thereupon ordered said bank to deliver to the receivers said overdue and previously unpaid interest coupons and, in cash, $5,580.00. Said coupons have been delivered to said

receivers and the sum of $5,580.00 paid to them by said bank pursuant to said adjudication and order; but $4,420.00 of said deposit has never come into the possession of said receivers.

[fol. 124] 2. Said Robert S. Waters and William G. Heiner have been appointed, and have duly qualified, as ancillary receivers of said National Radiator Corporation in the following jurisdictions in ancillary causes pending in the below mentioned courts between the parties to this cause:

Appointing court	Date of appointment
United States District Court for the District of New Jersey	October 9, 1931
United States District Court, District of Massachusetts	October 20, 1931
United States District Court for the Southern District of Ohio, Western Division	October 22, 1931
United States District Court for the Western District of New York	October 23, 1931
United States District Court for the Northern District of Illinois, Eastern Division	October 23, 1931
United States District Court for the District of Maryland	November 5, 1931
United States District Court for the Eastern District of Virginia	November 13, 1931
Supreme Court of the District of Columbia	November 30, 1931
United States District Court for the Eastern District of New York	December 24, 1931

[fol. 125] Robert S. Waters and Robert H. Richards, Jr., were appointed receivers of said National Radiator Corporation by the Court of Chancery of the State of Delaware on October 12, 1931, in an action instituted in said Court of Chancery by the complainants in this cause, and said Robert S. Waters and Robert H. Richards, Jr., have duly qualified as such receivers.

J. M. Feigenbaum was appointed ancillary receiver of said National Radiator Corporation by the Circuit Court of the City of St. Louis, Missouri, on the 18th day of Novem-

ber, 1931, in an action instituted against said National Radiator Corporation by one Abraham Ring as the owner of 50 shares of the common stock of said corporation. Said appointment was without previous notice to either said corporation or your receivers. Your receivers are informed and believe that the territorial jurisdiction of said Circuit Court of the City of St. Louis does not extend beyond the limits of said City of St. Louis. Immediately following said appointment, said Feigenbaum ordered your receivers' agent, who was at the time in possession of the premises and property of National Radiator Corporation in the City of St. Louis, to vacate said premises and to turn over said property to said Feigenbaum, and since that time said Feigenbaum has been in possession of said premises and property.

Upon notice of said appointment, said receivers caused the action instituted by said Ring to be removed from said [fol. 126] Circuit Court of the City of St. Louis to the United States District Court for the Eastern District of Missouri and caused motion to be made in said United States District Court for the discharge of said J. M. Feigenbaum as ancillary receiver, upon the ground that the petition of said Ring, which constitutes the basis of his prayer for the appointment of an ancillary receiver, does not state a good cause of action in equity. Said proceeding and said motion are still pending before said United States District Court for the Eastern District of Missouri.

3. Pursuant to said decree of this Court entered October 9, 1931, and pursuant also to corresponding orders and decrees entered in the various ancillary causes hereinabove referred to, said receivers have carried on, and are continuing to carry on, the business of said National Radiator Corporation, in accordance with the customs of the business and the trade in which said corporation is engaged. The properties of said corporation have been and are being operated as a unit or entirety.

The manufacturing plants at Johnstown, Pennsylvania, and New Castle, Pennsylvania, have been and are in operation. The manufacturing plants at Framingham, Massachusetts, Trenton, New Jersey, Dunkirk, New York, and Chicago, Illinois, were not in operation at the date of said decree, and said receivers have not caused them, as yet, to resume production.

It has been the practice of said corporation and of other concerns in the same business to increase manufacturing [fol. 127] operations during the winter months, the winter being the season of greater production, and it is under advisement by said receivers, unless otherwise directed by this Court and if business prospects commend such course, to re-open the manufacturing plant of said corporation at Trenton, New Jersey, early in the year 1932.

The latest date as of which final and definite figures on operations are available is November 30, 1931.

During the period October 9, 1931 to November 30, 1931, the cash receipts of said receivers were $949,493.21 and their cash expenditures were $536,984.33

On the accrual basis of accounting, without deduction for depreciation and without payment of interest on the funded indebtedness of said corporation, the operations of said receivers for the period October 9, 1931 to November 30, 1931, resulted in a loss of $14,630.44, but during said period your receivers carried an expense of $46,548.21 for maintenance of the above mentioned non-operating plants, which expense has been charged in computing said figure $14,630.44; and, on the same basis of accounting, with depreciation deductions taken at the rates heretofore used by said corporation but with no deduction for interest on said funded indebtedness, the operation of said business for said period resulted in a loss of $20,362,88 for the last twenty-three days of October and $65,895.07 for the calendar month of November. On the same basis, the loss of the company [fol. 128] for September, 1931, was $38,547.12 and for August, 1931, $65,376.05.

All of which is respectfully submitted,

Robert S. Waters, William G. Heiner, Receivers.

Duly sworn to by Robert S. Waters and William G. Heiner. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

INTERVENING PETITION OF BANKERS TRUST COMPANY—Filed Jan. 9, 1931

To the Honorable the Judges of said Court, sitting in equity:

Bankers Trust Company, as Trustee, files this its Intervening Petition in this cause against the defendant, Na-

[fol. 129] tional Radiator Corporation, and respectfully shows to this Honorable Court and alleges:

1. At all times hereinafter mentioned your petitioner was and still is a corporation duly organized and existing under the laws of the State of New York with a principal office in the City and State of New York.

2. Heretofore and on or about October 9, 1931, an order was entered in this cause appointing Robert S. Waters, of Johnstown, Pennsylvania, and William G. Heiner, of Pittsburgh, Pennsylvania, receivers in this cause of said defendant and of all and singular its properties, business and assets described in said order, to which order reference is hereby made with like effect as if herein set forth in full.

The following is a list of the various courts in which orders have been entered appointing said Robert S. Waters and William G. Heiner as receivers of the defendant in the primary cause or ancillary causes pending in said courts between the parties hereto, and of the respective dates of such appointment:

	Date of appointment
United States District Court for the Western District of Pennsylvania (Primary Cause)	October 9, 1931
District of New Jersey	October 9, 1931
District of Massachusetts	October 20, 1931
Southern District of Ohio, Western Division	October 22, 1931
Western District of New York	October 23, 1931
Northern District of Illinois, Eastern Division	October 23, 1931
[fol. 130] District of Maryland	November 5, 1931
Eastern District of Virginia	November 13, 1931
Eastern District of New York	December 24, 1931
and Supreme Court of the District of Columbia	November 30, 1931

Your petitioner is informed and believes and therefore alleges that said Robert S. Waters and William G. Heiner, subsequent to their appointment as primary receivers and ancillary receivers, have qualified as such by filing bonds in accordance with the terms of the orders above men-

tioned, and as such receivers are now in possession of substantially all of the properties, business and assets of the defendant and have been and now are carrying on the business of the defendant.

3. Your petitioner is advised of the contents of the original Bill of Complaint filed in this cause and is informed and believes that all of the allegations set forth in said Bill of Complaint are true, and they are hereby adopted and re-alleged by your petitioner, with like effect as if the same were again set forth at length herein, except that, with respect to the allegations contained in Paragraph Seventh of the Bill of Complaint, your petitioner is informed and believes and therefore alleges that, of the $12,000,000 aggregate principal amount of 6½% Sinking Fund Gold Debentures (hereinafter called the "Debentures") of the defendant heretofore issued as alleged in the Bill of Complaint, $158,000 principal amount thereof have been purchased and acquired by the defendant and have been cancelled and delivered to your petitioner by the defendant or [fol. 131] the receivers, so that, at the date hereof, $10,673,000 principal amount of Debentures are outstanding in the hands of divers persons who are the owners and holders thereof for value, and said Debentures are now in all respects valid and outstanding obligations of the defendant.

Upon information and belief, that, of the $10,673,000 principal amount of Debentures outstanding as aforesaid, $10,106,000 principal amount, at or prior to the date hereof, have been deposited with Bankers Trust Company, as Depositary under the Plan and Agreement of Reorganization referred to in the Bill of Complaint in this cause, together with the appurtenant coupons for interest due on February 1, 1931 and all subsequent interest dates, and the complainants in this cause are now the holders and owners of said Debentures and coupons; and the remaining $567,000 principal amount, together with the coupons for said interest, are, at the date hereof, in the hands of divers persons other than the complainants in this cause, except that certain coupons representing interest in the amount of $2,210 due on February 1, 1931, and interest in the amount of $2,210 due on August 1, 1931, a total of $4,420, have been paid, through the application, by way of set-off, of moneys of the defendant which were on deposit with the holder of said coupons.

4. Section 3 of Article V of the Indenture dated August 1, 1927 (hereinafter called the "Indenture") under which the Debentures were issued, provides as follows:

[fol. 132] "Section 3. In case

(a) default shall be made in the payment of any instalment of interest on any of the debentures when the same shall become payable, as therein or herein expressed; or

(b) default shall be made in the payment of the principal of any of the debentures when the same shall become due and payable, either at maturity or by declaration or otherwise; or

(c) default shall be made in the payment of any instalment of the sinking fund herein provided for when the same shall become payable;

then, upon demand of the Trustee, the Company will pay to the Trustee, for the benefit of the holders and registered owners of the debentures and coupons then outstanding, the whole amount that then shall have become due and payable on all such debentures and coupons then outstanding, for interest or principal, or both, or will pay to the Trustee all payments then due in respect of the sinking fund, as the case may be, with interest in each instance at the rate of six and one-half per centum (6½%) per annum, upon the overdue principal, instalments of interest or sinking fund payments; and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Trustee, its agents, attorneys and counsel, and any expense or liabilities incurred by the Trustee hereunder; and, in case the Company shall fail to pay the same forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled to recover judg-[fol. 133] ment for the whole amount so due and unpaid and to enforce such judgment in accordance with law."

5. In Section 5 of Article V of the Indenture, it is further provided that, upon written request of the holders or registered owners of at least one-fourth in principal amount of the Debentures at the time outstanding, and upon being indemnified to its satisfaction, if the Trustee shall so require, it shall be the duty of the Trustee to take

all steps needful for the protection and enforcement of its rights and the rights of the holders or registered owners of the Debentures, whether by judicial proceedings or otherwise, as the Trustee, being advised by counsel, shall deem most expedient in the interest of the holders or registered owners of the Debentures.

6. The defendant did not make payment of any part of the sum of $346,872.50 required to be paid on February 1, 1931 or any part of the same sum required to be paid on August 1, 1931, as interest on the $10,673,000 principal amount of the Debentures then and now outstanding and due as provided in said Debentures, although the coupons belonging to said Debentures representing the interest due on said respective dates, or some thereof, were duly presented for payment and payment duly demanded, and such failure constitued an event of default under the terms of said Indenture.

7. Said event of default having occurred as aforesaid, the holders of more than one-fourth in principal amount of the Debentures then and now outstanding requested your petitioner to take all steps needful for the protection and en- [fol. 134] forcement of the rights of the holders or registered owners of the Debentures, whether by judicial proceedings or otherwise, and your petitioner, pursuant to said request, did thereafter demand payment of said instalments of interest, and no part thereof being paid, did, with the leave of the District Court of the United States for the Western District of Pennsylvania first obtained, in its own name and as trustee of an express trust, commence an action in assumpsit in said Court against the defendant entitled "Bankers Trust Company, Trustee, Plaintiff, vs. National Radiator Corporation, Defendant, No. 6776 Law" and in said action obtained judgment on October 13, 1931 against said defendant in the amount of $713,944.38 for the instalments of interest due February 1, 1931 and August 1, 1931, respectively, on all of the Debentures then and now outstanding, with interest.

8. Section 2 of Article V of the Indenture contains, among other things, the provision that, in case default shall be made in the payment of any instalment of interest on any of the Debentures when the same shall become payable as in the Debentures or in the Indenture expressed, then,

the Trustee may, in its discretion, and, upon request in writing by the holders of at least one-fourth in principal amount of the Debentures then outstanding, shall, declare the principal of and interest on all the Debentures, if not already due, to be forthwith due and payable, and upon such declaration the same shall become due and payable immediately. Pursuant to this provision, your petitioner did, on December 24, 1931, pursuant to written request of [fol. 135] the holders of more than one-fourth in principal amount of the oustanding Debentures, duly declare the principal of and interest on all the Debentures outstanding to be immediately due and payable and upon such declaration the same did become forthwith due and payable.

9. The principal of and interest upon the outstanding Debentures having become immediately due and payable as aforesaid, and the defendant having defaulted in the payment of the same on due presentation for payment of certain of the Debentures, your petitioner did, pursuant to the request of the holders of more than one-fourth in principal amount of the Debentures then and now outstanding, demand payment of said principal and interest, and no part there being paid, did in its own name and as trustee of an express trust, with the leave of the District Court of the United States for the Western District of Pennsylvania first obtained, commence an action in assumpsit in said Court against the defendant, entitled "Bankers Trust Company, Trustee, Plaintiff, vs. National Radiator Corporation, Defendant, No. 6851 Law," and in said action obtained judgment on December 30, 1931, against said defendant in the sum of $10,948,597.33, for the $10,673,000 principal amount of Debentures outstanding, with interest on said Debentures from August 1, 1931, to December 24, 1931, in the sum of $275,597.33, plus $11,698.50 representing interest on said total sum of $10,948,597.33 from December 24, 1931, to the date of said judgment, making the total amount of said judgment $10,960,295.83.

[fol. 136] 10. Upon information and belief, that the cash and other immediately realizable assets of the defendant are wholly insufficient for the payment of the indebtedness of the defendant now due, and the defendant is presently unable to pay or obtain an amount sufficient for the pay-

ment of the indebtedness now due and owing by the defendant.

11. Your petitioner has no adequate remedy at law and has relief only in a court of equity.

Wherefore your petitioner prays:

1. That said judgments obtained by your petitioner, as hereinbefore alleged, be enforced in this cause, and that this Court ascertain and decree the rights of your petitioner, as Trustee and judgment creditor, and the rights of the holders of the 6½% Sinking Fund Gold Debentures of National Radiator Corporation and the coupons thereto appertaining.

2. That, at such time as your petitioner shall hereafter apply therefor, a decree or judgment be rendered in this cause in favor of your petitioner, as Trustee as aforesaid, for the use and benefit of the holders of the 6½% Sinking Fund Gold Debentures of National Radiator Corporation, in an amount equivalent to the aggregate of said judgments, with interest, together with all moneys due and to become due and payable under and by virtue of said Indenture dated August 1, 1927, and a sum sufficient to pay the costs and expenses of this action, and the compensation, costs and expenses of your petitioner, as a party plaintiff herein, and of its agents, attorneys and counsel, and any and all [fol. 137] expenses and liabilities incurred by your petitioner as Trustee under the Indenture; and that, in default of the payment of the sum so decreed or adjudged to be payable, the properties and assets and business of the defendant National Radiator Corporation may be ordered to be sold as an entirety, with such exceptions and in such manner and upon such terms and conditions as this Court shall deem just and equitable and as your petitioner shall request, and that any such order shall make proper and suitable provision for the protection of all equities, rights, priorities, claims and liens of the creditors of the defendant and shall provide for the sale of the properties, assets and business of the defendant, subject to or free and clear from any and all liens or encumbrances, and that the proceeds of any such sale may be distributed, by and under the direction of this Court, among the creditors of the defendant and such others, if any, as this Court may adjudicate.

3. And your petitioner joins in each and every prayer for relief contained in the original Bill of Complaint in this cause, and further prays that your petitioner may have such other and further relief in the premises as the nature and circumstances of this case may require and as to this Honorable Court may seem meet.

Bankers Trust Company, by H. F. Wilson, Jr., Vice-President. J. Garfield Houston, Solicitor for Petitioner. White & Case, of Counsel.

[fol. 138] *Duly sworn to by H. F. Wilson, Jr. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

PETITION OF BANKERS TRUST COMPANY FOR LEAVE TO INTERVENE—Filed Jan. 9, 1932

To the Honorable the Judges of said Court, sitting in equity:

The petition of Bankers Trust Company, as Trustee under the below mentioned Indenture of National Radiator Corporation, respectfully shows:

[fol. 139] That, defaults having occurred under the Indenture dated August 1, 1927, executed by National Radiator Corporation to Bankers Trust Company, as Trustee, a copy of which Indenture is annexed as "Schedule A" to the original Bill of Complaint in this cause, in that said Corporation has not made due and punctual payment of the principal of or interest on its outstanding 6½% Sinking Fund Gold Debentures issued under said Indenture when the same became due and payable, although demand was duly made for payment, and your petitioner Bankers Trust Company, as Trustee, by leave of the District Court of the United States for the Western District of Pennsylvania, having obtained judgments, as such Trustee for the benefit of the holders of said Debentures and the coupons thereto appertaining, for the amounts due and payable for such principal and interest, with interest, on the overdue principal and interest, your petitioner, as such Trustee and judgment creditor of the defendant, is entitled to intervene in this cause as a party plaintiff and desires to file in this

cause and does herewith exhibit to this Court its Intervening Petition for relief as therein prayed.

Wherefore your petitioner prays that an order be made by this Honorable Court granting leave to your petitioner as such Trustee and judgment creditor to intervene as a party plaintiff, and to file its said Intervening Petition, in this cause, and requiring the defendant to answer said Intervening Petition, and that your petitioner may have such [fol. 140] other and further relief as may be just and proper.

Dated January 7, 1932.

Bankers Trust Company, by H. F. Wilson, Jr., Vice-President. J. Garfield Houston, Solicitor for Bankers Trust Company. White & Case, of Counsel.

Duly sworn to by H. F. Wilson, Jr. Jurat omitted in printing.

[fol. 141] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO BANKERS TRUST COMPANY, AS TRUSTEE AND JUDGMENT CREDITOR, TO INTERVENE AS A PARTY PLAINTIFF—Filed Jan. 9, 1932

Upon reading and filing the petition of Bankers Trust Company, as Trustee and as a judgment creditor of the defendant National Radiator Corporation, for leave to intervene in this cause and to become a party plaintiff herein and to file its Intervening Petition in this cause and for other relief, and the parties hereto having admitted due and timely notice of the filing and presentation of said petition and having consented to such intervention, and the Court being fully advised in the premises, it is

Ordered, adjudged and decreed that the prayer of said petition of Bankers Trust Company for leave to intervene as aforesaid in this cause be and the same hereby is granted, and that said intervener, as such Trustee and judgment creditor of the defendant, be and hereby is made a party plaintiff to this cause with leave to file herein its said Intervening Petition, and that the defendant, National

Radiator Corporation, shall file its answer to said Intervening Petition within 20 days after the filing thereof.

Dated January 9, 1932.

Per Curiam.

G.

The undersigned hereby admit due and timely notice of the filing and presentation of the foregoing petition of [fol. 142] Bankers Trust Company, as Trustee and as a judgment creditor of defendant, for leave to intervene and to become a party plaintiff herein, and to file its Intervening Petition in this cause and for other relief, and hereby waive all further notice of the hearing or application thereon, and consent to the entry of an order of the foregoing form.

Dated January 8th, 1932.

Reed, Smith, Shaw & McClay, Maynard Teall, Solicitors for the Complainants. H. S. Endsley, Solicitor for the Defendant. Robert S. Waters, William G. Heiner, Receivers.

IN UNITED STATES DISTRICT COURT

ANSWER TO INTERVENING PETITION—Filed Feb. 13, 1932

National Radiator Corporation, the defendant herein, in answer to the Intervening Petition in this cause of Bankers Trust Company, files this its answer and says:

The defendant, National Radiator Corporation, admits each and every allegation contained in the aforesaid Intervening Petition of Bankers Trust Company filed herein and joins in each and every prayer thereof.

National Radiator Corporation, by Chas. L. Crouse, [fol. 143] Vice President. Attest: Carl E. Resley, Secretary. (Seal.) H. S. Endsley, Solicitor for Defendant.

Dated February 11th, 1932.

IN UNITED STATES DISTRICT COURT

PETITION OF FIRST NATIONAL BANK OF CINCINNATI FOR LEAVE TO INTERVENE AS PARTY DEFENDANT—Filed Feb. 17, 1932

To the Honorable the Judges of said Court:

The petition of the First National Bank of Cincinnati, Ohio, respectfully represents:

(1) Your petitioner is the owner and holder of Sixty-eight Thousand ($68,000.00) Dollars par value 6½% sinking fund gold debentures of the National Radiator Corporation, the defendant in the above entitled cause, and that it has been the owner and holder of such debentures since approximately the date of original issuance in 1927.

(2) Your petitioner is acquainted with the contents and substance of the Bill of Complaint in the above entitled case, and is further acquainted with the decree of this Court, dated October 9, 1931, appointing receivers of all the property and assets of said corporation, in accordance with the relief prayed for in said Bill of Complaint.

(3) On or about February 11, 1931, the corporation hav- [fol. 144] ing defaulted in the payment of its February 1, 1931, interest coupons on said bonds, a so-called Reorganization Committee (composed of Rudolph B. Flershem, Charles O. Cornell and John H. Waters) sponsored by the company's management, formulated and issued a Plan and Agreement of Reorganization, and urged bondholders to deposit their bonds in acceptance of this plan. A copy of this plan and agreement is attached to the original Bill of Complaint. As appears by the Ninth paragraph of said Bill of Complaint Frank B. Cahn was later elected a member of the Reorganization Committee.

(4) The original complainants herein, Flershem, Cornell, Waters and Cahn, as the so-called Reorganization Committee and proponents of the plan of reorganization attached to their Bill of Complaint, filed their said Bill of Complaint for the purpose of bringing about the receivership herein as a step in effectuating said plan, notwithstanding the opposition to such plan of your petitioner and of the other dissenting bondholders who have not seen fit to subscribe to such plan. There is no party to the suit whose interests

are similar to the interests of your petitioner and the other dissenting bondholders. The interests of the complainants, who brought about as aforesaid the receivership for the purposes above stated, are directly opposed to the interests of your petitioner. The interests of your petitioner as a bondholder, in the proper liquidation of the assets of the corporation, will not be adequately or properly protected unless your petitioner is permitted to intervene as a party defendant for the purpose of the protection of its own interests.

[fol. 145] Wherefore your petitioner, First National Bank of Cincinnati, Ohio, for the purpose of protecting its rights and the rights of bondholders similarly situated who may join in this intervention and contribute to the expense thereof, asks this Court to make and cause to be entered an order permitting your petitioner to intervene herein as a party defendant.

First National Bank of Cincinnati, by John J. Rowe, President. Baker & Watts, Solicitors. Ehrich, Royall, Wheeler & Walter, of Counsel.

Duly sworn to by John J. Lowe. Jurat omitted in printing.

[fol. 146] In United States District Court

Order to Show Cause

And now, to-wit, this 17th day of February, 1932, the foregoing petition being presented in open court, upon consideration thereof it is ordered that said petition be filed and that a rule is hereby granted upon National Radiator Corporation, defendant, Bankers Trust Company, intervenor and upon Rudolph B. Flersheim, Charles O. Cornell, John H. Waters and Frank B. Cahn, Reorganization Committee, complainants to show cause why the First National Bank of Cincinnati, Ohio, should not be permitted to intervene in these proceedings to No. 2558, In Equity, as an additional party defendant, returnable Feb. 29, 1932.

Per Curiam.

G.

In United States District Court

Answer of Bankers Trust Company, Intervening Complainant, to Petition of First National Bank of Cincinnati—Filed March 1, 1932

Bankers Trust Company, Trustee, intervening complainant in the above proceedings, herein referred to as the [fol. 147] respondent, makes answer to the petition of the First National Bank of Cincinnati, Ohio, and the rule granted thereon for leave to intervene in these proceedings as an additional party defendant, as follows:

1. Paragraph 1 of said petition is admitted.

2. Paragraph 2 of said petition is admitted.

3. Paragraph 3 of said petition is admitted, except respondent has no knowledge as to whether the said Reorganization Committee was sponsored by the company's management.

4. Answering Paragraph 4 of said petition, respondent avers that, as trustee under the Indenture under which said 6½% Sinking Fund Gold Debentures of National Radiator Corporation were issued, it obtained a judgment against said corporation on October 13, 1931 in behalf of the holders of all of the outstanding debentures, for interest on said debentures due February 1, 1931 and August 1, 1931, in the amount of $713,944.38 including interest to date of judgment, at No. 6776 Law in this Court.

Respondent avers that on December 30, 1931 respondent also obtained a judgment against said corporation in behalf of the holders of all the outstanding debentures for the principal sum thereof, and accrued interest to date of judgment, in the amount of $10,960,295.83 at No. 6851 Law in this Court.

Respondent avers that subsequent to the entry of the [fol. 148] said judgments, to-wit on January 9, 1932, respondent as trustee of an express trust under the said Indenture, after leave of court duly obtained, intervened in these equity proceedings as an additional complainant, in behalf of the holders of all of the outstanding debentures; and respondent filed of record an intervening petition, the prayer whereof was (inter alia) for the enforcement of the

said judgments obtained by the respondent in behalf of the holders of all of the said debentures.

Respondent avers that since such intervention in these proceedings, it has endeavored by the exercise of the best judgment of its officers and solicitors to protect the interests of the holders of all of the said debentures and that it will continue to do so.

Further answering said petition:

5. On advice of counsel, respondent denies the right of petitioner to intervene in these proceedings as a party defendant on the grounds that the said petition contains no averments showing petitioner to be a proper or necessary party defendant, and that said petition fails to aver petitioner's intention to contest the allegations of the Bill of Complaint and those of the Intervening Petition of the Bankers Trust Company.

6. Respondent makes no objection to the petitioner appearing and being heard in these proceedings from time to time, if petitioner deems itself to have interests not common to other holders of debentures and deems it necessary to have such interests specially protected, but such [fol. 149] appearance and hearing to be only in subordination to and in recognition of the propriety of the main proceedings as provided in Equity Rule 37.

Bankers Trust Company, Trustee, by H. F. Wilson, Jr., Vice-President. J. Garfield Houston, Solicitor for Petitioner. White & Case, of Counsel.

Duly sworn to by H. F. Wilson, Jr. Jurat omitted in printing.

[fol. 150] IN UNITED STATES DISTRICT COURT

ANSWER OF THE COMPLAINANTS TO THE PETITION OF THE FIRST NATIONAL BANK OF CINCINNATI FOR LEAVE TO INTERVENE AS A PARTY DEFENDANT—Filed March 2, 1932

The complainants in this cause, answering the petition of First National Bank of Cincinnati verified December 26, 1931, for leave to intervene herein as a party defendant, say:

1. The complainants admit the allegations contained in paragraphs 1, 2 and 3 of said petition.

2. Answering the allegations contained in paragraph 4 of said petition, the complainants admit that they filed the Bill of Complaint in this cause as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931, but the complainants deny the intimation contained in said paragraph 4 that said Plan and Agreement is opposed by "the other dissenting bondholders who have not seen fit to subscribe to such plan" but on the contrary the complainants are informed and believe and therefore allege that the great majority of the holders of Debentures of National Radiator Corporation who have not seen fit to subscribe to said Plan have omitted to do so for reasons other than any positive opposition to said Plan, and so far as complainants are aware, expressed opposition to said Plan has emanated only from said First National Bank of Cincinnati and a few other holders of a limited amount of said Debentures.

[fol. 151] Further answering the allegation of said paragraph 4 of said Petition, the complainants allege that Bankers Trust Company, as Trustee under the Indenture dated August 1, 1927 under which said Debentures were issued, and as the holder of judgments for the entire amount due and owing on all said Debentures now outstanding, for both principal and interest, has filed its Intervening Petition in this cause as a party plaintiff for the purpose of enforcing said judgments and ascertaining and decreeing the rights of all holders of said outstanding Debentures; and for further relief for the use and benefit of all holders of said Debentures, as prayed for in said Intervening Petition. Under the terms of said Indenture under which said Debentures were issued, Bankers Trust Company is constituted the trustee for all holders of said Debentures, and said Petition of First National Bank of Cincinnati contains no allegations whatsoever showing why the interest of said Bank will not be adequately or properly protected by said Bankers Trust Company as trustee as aforesaid, and consequently said Petition shows no reason why said First National Bank of Cincinnati should be permitted to intervene as a party defendant in this cause as it is well settled that when a trustee for bondholders is a party to a suit to enforce the bonds, the trustee represents all the bondholders and the latter will not be permitted to intervene unless a showing is made that the trustee has an interest

hostile to the bondholders or is otherwise guilty of fraud or collusion, or of bad faith.

[fol. 152] Furthermore, the complainants allege that said First National Bank of Cincinnati should not be permitted to intervene as a defendant in this cause because its said Petition shows no reason why it should appear in this cause in the capacity of a defendant. Said Petition does not show said First National Bank of Cincinnati has or intends to file any answer or defense in these proceedings, and it is a well settled rule of practice in federal courts of equity that a petition to be permitted to intervene as a defendant must be accompanied by the answer which the petitioner proposes to file in the interests of an orderly administration of the suit and to the end that the court may judge of the merits of the defense. As said Petition for intervention was verified on December 26, 1931, said First National Bank of Cincinnati has had more than two months to formulate an answer or defense or other pleading which it may desire to file in this cause. In view of the matters hereinbefore alleged and in view of the fact that an intervention of this character rests entirely within the discretion of the court, the complainants submit that said Petition should be denied.

Wherefore complainants pray that said Petition of First National Bank of Cincinnati for leave to intervene in this cause as a party defendant be denied.

Rudolph B. Flershem, Charles O. Cornell, John H. Waters, Frank B. Cahn, and Maynard Teall, by Reed, Smith, Shaw & McClay, Their Solicitors.

[fol. 153] *Duly sworn to by John H. Waters. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ANSWER OF NATIONAL RADIATOR CORPORATION, DEFENDANT, TO PETITION OF THE FIRST NATIONAL BANK OF CINCINNATI FOR LEAVE TO INTERVENE AS PARTY DEFENDANT IN THE CAUSE PENDING IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA, IN EQUITY 2558

Now, National Radiator Corporation, Defendant, in Answer to the Petition of the First National Bank of Cincinnati, for leave to intervene as party-defendant, says:

[fol. 154] That the foregoing Answer of Rudolph B. Flershem, et al., Complainants, has been read and considered; and Defendant hereby joins in said Answer, and prays that it be taken as the Answer of this Defendant to the Petition of the First National Bank of Cincinnati, and to the Rule granted thereon, and prays that the said Rule be dismissed and that said Petition be denied, for the reasons set forth in the foregoing Answer of Complainants.

National Radiator Corporation, by Chas. L. Crouse, Vice-President.

Attest: Carl E. Resley, Secretary. (Seal.)

Duly sworn to by Chas. L. Crouse. Jurat omitted in printing.

[fol. 155] IN UNITED STATES DISTRICT COURT

ORDER MAKING FIRST NATIONAL BANK OF CINCINNATI, OHIO, PARTY DEFENDANT—Filed March 3, 1932

And now, to-wit, this 3rd day of March, 1932, the petition of First National Bank of Cincinnati, Ohio, verified December 26, 1931 and filed herein on February 17, 1932, having come on to be heard, and the Bankers Trust Company, as Trustee, and the Complainants and the defendant having consented in open court to the granting of the prayer of said petition and to the making of this order, now, therefore, upon consideration thereof, on motion of counsel for petitioner,

It is ordered that the First National Bank of Cincinnati, Ohio, be and it is hereby made a party defendant to this cause, but in subordination to and in recognition of the propriety of the main proceeding.

Per Curiam.

G.

[fol. 156] IN UNITED STATES DISTRICT COURT

Statement of Evidence—Filed March 3, 1932

Testimony on behalf of the complainants, taken at the principal office of Bankers Trust Company, 16 Wall Street, in the Borough of Manhattan, city and State of New York, on February 29, 1932, at 10:00 o'clock a. m., before J. King Evans, Esq., examiner appointed for such purpose by order of the said court made and entered therein February 19, 1932

APPEARANCES

Mr. G. Franklin Ludington for Milbank, Tweed, Hope & Webb, of counsel for complainants;

Mr. Carlos Isreals for White & Case, of counsel for Bankers Trust Company, Intervenor;

Mr. Arthur E. Goddard, by William Shea, of counsel for defendant.

STIPULATION RE TESTIMONY AND EXHIBITS

It is stipulated and agreed by the parties to this cause, without waiving any right to object to the materiality or relevancy of the testimony hereinafter appearing, that:

(a) All formal notice of the taking of testimony and of the name of each witness whose testimony is to be taken and of the time and place of taking the same, viz.: between the hours of 10:00 and 11:30 o'clock a. m., on February 29, 1932, at the principal office of Bankers Trust Company, 16 Wall Street, in the Borough of Manhattan, City and State of New York, is waived.

(b) The testimony, by oral interrogatories or in the form of narrative, of William C. Meyers, Carl E. Resley, Harold F. Linder and any other person or persons who may [fol. 157] be produced before the Examiner appointed to take the same, may be taken on examination before said Examiner.

(c) Exhibits 1 to 55, attached to the depositions of said witnesses and respectively certified by E. W. Emmens, as Notary Public, to have been by him compared with the

originals offered in evidence and found by him to be true and correct copies of said originals, may be substituted in the place and stead of said originals, as part of the record in this cause and reference may be made to said Exhibits with the same force and effect as if the originals thereof were made a part of the record in this cause.

(d) The delivery of said depositions by J. King Evans, Esq., as Examiner, before whom said depositions are taken or the sealing of said depositions by him and the directing of the same to said Court are waived.

(e) Said depositions or any thereof may be read at the final hearing in this cause with the same force and effect as if all formalities of statute or rules of Court in respect of the taking of the same had in all respects been duly complied with.

TESTIMONY OF WILLIAM C. MEYERS

WILLIAM C. MEYERS, being first duly sworn, in response to oral interrogatories of counsel for complainants, deposes and says:

Direct examination.

By Mr. Israels:

Q. Will you please state your name and residence?

[fol. 158] A. William C. Meyers, 284 Gregory avenue, West Orange, New Jersey.

Q. What is your connection with Bankers Trust Company?

A. I am an Assistant Secretary connected with its Corporate Trust Department, at its principal office, 16 Wall street, in the Borough of Manhattan, City and State of New York.

Q. How long have you held such office?

A. For over a year.

Q. Were you in the employ of Bankers Trust Company prior to becoming an Assistant Secretary?

A. Yes; I was employed as a clerk in the Corporate Trust Department for approximately fourteen years.

Q. Through your connection with the Corporate Trust Department of Bankers Trust Company, are you familiar

with its trusteeship under the Indenture of National Radiator Corporation dated August 1, 1927?

A. With other officers of the Corporate Trust Department, I have had and now have supervision over and charge of all corporate trust records of Bankers Trust Company. As a Corporate Trust clerk and later as Assistant Secretary in the Corporate Trust Department I have been familiar with the Indenture dated August 1, 1927, between National Radiator Corporation and Bankers Trust Company, as Trustee, since its inception.

Q. Has Bankers Trust Company in its possession an original counterpart of that Indenture?

A. It has.

[fol. 159] Q. Will you please produce from the files of Bankers Trust Company such original counterpart?

A. I produce from the files of Bankers Trust Company an original counterpart of the Indenture dated August 1, 1927, between National Radiator Corporation and Bankers Trust Company, as Trustee.

Q. Are you acquainted with the persons whose names are subscribed to this counterpart and can you identify their signatures?

A. I know Mr. R. G. Page to have been a Vice-President and Mr. P. G. Gates to have been an Assistant Secretary of Bankers Trust Company at the time this Indenture was executed, and I know the signatures appearing on this counterpart to be their true respective signatures.

Q. Is the corporate seal of Bankers Trust Company affixed to this counterpart its true and proper corporate seal?

A. It is.

Q. How long has Bankers Trust Company acted as Trustee under this Indenture?

A. According to the records of Bankers Trust Company and the acknowledgments appended to this Indenture, it was duly executed and delivered August 30, 1927, and Bankers Trust Company has been acting as Trustee thereunder continuously from that date until the present time. I call your attention to the fact that attached to the original copy of this Indenture herewith produced, are United States documentary stamps properly cancelled in the sum of $6,000.

[fol. 160] Mr. Israels: I offer in evidence this original counterpart of the Indenture dated August 1, 1927 between

National Radiator Corporation and Bankers Trust Company, as Trustee.

(Copy of the Indenture dated August 1, 1927, between National Radiator Corporation and Bankers Trust Company, as Trustee, received in evidence as Complainants' Exhibit 1, hereinafter in this Deposition referred to as the "Indenture.")

Q. By what authority does Bankers Trust Company act as Trustee under the Indenture?

A. Bankers Trust Company is a corporation duly organized as a Trust Company under the Banking Law of State of New York with power so to act.

Q. Where is its principal office and place of business in the State of New York?

A. At 16 Wall street, in the Borough of Manhattan, in the City of New York.

Q. Have you a copy of its Certificate of Organization?

A. I have.

Q. Will you please produce it from the files of Bankers Trust Company?

A. I produce from the files of Bankers Trust Company a certified copy of its Certificate of Organization.

Mr. Israel: I offer in evidence this certified copy of the Certificate of Organization of Bankers Trust Company.

[fol. 161] (Certified copy of the Certificate of Organization of Bankers Trust Company received in evidence as Complainants' Exhibit 2.)

Q. Do you know under the laws of what State National Radiator Corporation is organized?

A. I produce from the files of Bankers Trust Company a certified copy of the Certificate of Incorporation of National Radiator Corporation, showing it to have been organized in 1927 under the laws of the State of Delaware.

Mr. Israels: I offer in evidence this certified copy of the Certificate of Incorporation of National Radiator Corporation.

(Copy of the Certificate of Incorporation of National Radiator Corporation received in evidence as Complainants' Exhibit 3.)

Q. What do the records of Bankers Trust Company show as to the due authorization by National Radiator Corporation of the Indenture?

A. I produce from the files of Bankers Trust Company a certified copy of the By-laws of National Radiator Corporation and certified excerpts from minutes of meetings of its Board of Directors held and taking action as follows:

First. August 1, 1927, to authorize the creation of an issue of its 6½% Sinking Fund Gold Debentures in the principal sum of $16,000,000.

Second. August 27, 1927, to approve the form of temporary Debentures of this issue.

Third. August 29, 1927, to approve the form of the Indenture.

[fol. 162] Mr. Israels: I offer in evidence this copy of By-laws and these certified excerpts of minutes.

(Copies of the By-laws of National Radiator Corporation and of the certificates of Vincent Westrup, Secretary of National Radiator Corporation, to excerpts from the minutes of meetings of the Board of Directors of National Radiator Corporation, held August 1, August 27 and August 29, 1927, received in evidence as Complainants' Exhibits 4, 5, 6 and 7—a copy of the Indenture constituting a part of said Exhibit 7 being in evidence as Complainants' Exhibit 1.)

Q. Will you state when and under what circumstances Debentures were issued under the Indenture?

A. Contemporaneously with the execution of the Indenture, that is, on August 30, 1927, there was duly executed by National Radiator Corporation and authenticated and delivered by Bankers Trust Company, as Trustee, an interim temporary Debenture in the sum of $1,935,000. On the same date, this temporary Debenture was surrounded and cancelled and $12,000,000 principal amount of temporary Debentures were duly executed by National Radiator Corporation and authenticated and delivered by Bankers Trust Company, upon the written order of National Radiator Corporation and against the written receipt of Bankers Trust Company as Escrow Depositary for Na-

tional Radiator Corporation, which written order and receipt I herewith produce from the files of Bankers Trust Company.

[fol. 163] Mr. Israels: I offer in evidence this written order and receipt.

(Copy of the order dated August 30, 1927, for the issuance of Debentures and of the receipt for the delivery of said Debentures received in evidence as Complainants' Exhibits 8 and 9.)

Q. Can you produce from the files of Bankers Trust Company a specimen of the temporary Debentures of National Radiator Corporation of the form issued?

A. I have here such a specimen.

Mr. Israels: I offer the same in evidence.

(Specimen of temporary Debentures of National Radiator Corporation received in evidence as Complainants' Exhibit 10.)

Q. What disposition was made of these temporary Debentures?

A. In due course these temporary Debentures were all surrendered and cancelled and in their stead a total of $12,000,000 principal amount of definitive Debentures were issued. I have here a specimen of these definitive Debentures.

Mr. Israels: I offer the same in evidence.

(Specimen of definitive Debentures of National Radiator Corporation received in evidence as Complainants' Exhibit 11, said Debentures hereinafter in this Deposition being referred to as the "Debentures.")

[fol. 164] Q. Were any additional Debentures issued?

A. No.

Q. Have any supplemental Indentures been executed and delivered between National Radiator Corporation and Bankers Trust Company, as Trustee?

A. No.

Q. Do the records of Bankers Trust Company show what disposition has been made of the $12,000,000 principal amount of Debentures which were issued?

A. Yes. Through the operation of the sinking fund provided for in the Indenture, by semi-annual sinking fund payments made by National Radiator Corporation up to February 1, 1931, a total of $1,169,000 principal amount of the Debentures were retired and cancelled. National Radiator Corporation is, however, in default under the terms of Section 1 of Article III of the Indenture in that it has failed to make the semi-annual sinking fund payment of $201,918.50 required to be paid by it prior to August 1, 1931, and the semi-annual sinking fund payment of $207,996.00, required to be paid by it prior to February 1, 1932. Bankers Trust Company received, however, from National Radiator Corporation some months ago $158,000 principal amount of Debentures which had been held in its treasury. These Debentures were first marked cancelled by National Radiator Corporation and have since been duly cancelled by Bankers Trust Company, as Trustee.

Q. How many Debentures, therefore, now remain outstanding?

A. $10,673,000 principal amount.

Q. Where are the principal and interest of the Debentures payable?

[fol. 165] A. At the paying agency of National Radiator Corporation in Chicago and at its paying agencies in New York City.

Q. What are its paying agencies in New York City?

A. Bankers Trust Company and J. & W. Seligman & Co.

Q. Will you please state when payment of interest was last made by National Radiator Corporation on its outstanding Debentures?

A. August 1, 1930.

Q. Will you please state the circumstances surrounding the subsequent default of National Radiator Corporation in the payment of interest on the Debentures?

A. Yes. National Radiator Corporation customarily deposited with Bankers Trust Company funds for the payment of interest several days before the required interest payment dates, which are February 1 and August 1 in each year. These funds were not forthcoming prior to February 1, 1931, and on that date there were no funds with Bankers Trust Company nor, I am reliably informed, with the paying

agency in Chicago, for the payment of interest due on that date. As a matter of fact, Bankers Trust Company received on February 1, 1931, a certified copy of resolutions of the Board of Directors of National Radiator Corporation adopted at its meeting held January 31, 1931, evidencing its determination not to pay interest on its outstanding Debentures February 1, 1931, which I have here. The records of Bankers Trust Company show that no funds for the pay- [fol. 166] ment of interest on the Debentures have at any time since February 1 been deposited with it, either for the payment of interest due Febuary 1, 1931, or for the payment of interest which has subsequently become due August 1, 1931.

Mr. Israels: I offer in evidence a certified copy of the resolutions referred to.

(Certified copy of the resolutions of the Board of Directors of National Radiator Corporation, adopted at its meeting held January 31, 1931, received in evidence as Complainants' Exhibit 12.)

Q. Were any coupons appertaining to the Debentures presented for payment?

A. Yes.

Q. Can you state the circumstances under which such coupons were presented?

A. A certain number of coupons, having been deposited by the holders thereof in their respective banks for collection, were presented in the usual course and some coupons were presented directly to Bankers Trust Company for payment on as well as after February 1, 1931. On February 13, 1931, however, Bankers Trust Company was appointed Depositary under a Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, which Plan and Agreement permitted the deposit under it of Debentures only if accompanied by the February 1, 1931, and subsequent coupons. I produce from the files of Bankers Trust Company an original counterpart of this Plan and Agreement which has been signed and delivered to Bankers Trust Company by the members of the Reorganization Committee named in it.

[fol. 167] Mr. Israels: I offer this original counterpart in evidence.

(Copy of the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, received in evidence as Complainants' Exhibit 13, hereinafter in this Deposition referred to as the "Reorganization Plan and Agreement.")

By minute dated September 17, 1931, an original counterpart of which is on file with Bankers Trust Company, Rudolph B. Flershem, Charles O. Cornell and John H. Waters, as the Reorganization Committee constituted and appointed by the Reorganization Plan and Agreement, added Frank B. Cahn as an additional member.

Mr. Israels: I offer in evidence an original counterpart of the minute dated September 17, 1931, just referred to.

(Original counterpart of the Reorganization Committee's minute dated September 17, 1931, received in evidence as Complainants' Exhibit 14,)

At the close of business October 2, 1931, there was on deposit with Bankers Trust Company, as Depositary under the Reorganization Plan and Agreement, $8,750,000 principal amount of the Debentures. At the close of business October 7, 1931, there was on deposit with Bankers Trust Company, as Depositary under the Reorganization Plan and Agreement, $8,783,000 principal amount of the Debentures. At the close of business December 23, 1931, there [fol. 168] was on deposit with Bankers Trust Company, as Depositary under the Reorganization Plan and Agreement, $10,104,000 principal amount of the Debentures. Upon instructions received by letter dated October 1, 1931, from Messrs. Rudolph B. Flershem, Charles O. Cornell; John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted and acting under the Reorganization Plan and Agreement, Bankers Trust Company, as Depositary, on behalf of this Reorganization Committee, by letter dated October 2, 1931, presented for payment coupons due February 1, 1931, aggregating $264,082.50 and like coupons due August 1, 1931, aggregating $284,310.00, appertaining to the Debentures and made demand of National Radiator Corporation for the payment of the same. That same day

payment was declined by Bankers Trust Company, as paying agent for National Radiator Corporation, for the reason that there were no funds on deposit with it with which to make such payment. I produce from the files of Bankers Trust Company copies of the Reorganization Committee's letter dated October 1, 1931, addressed to Bankers Trust Company, and of Bankers Trust Company's letters dated October 2, 1931, addressed to that institution as paying agent for National Radiator Corporation and addressed to National Radiator Corporation.

Mr. Israels: I offer in evidence these letters.

(Copies of the Reorganization Committee's letter dated October 1, 1931, addressed to Bankers Trust Company, and of Bankers Trust Company's letters dated October 2, 1931, [fol. 169] addressed to said institution as paying agent for National Radiator Corporation and addressed to said Corporation, received in evidence as Complainants' Exhibits 15, 16 and 17.)

Q. Has Bankers Trust Company itself taken any steps to enforce the provisions of the Indenture?

A. Yes. Upon instructions received by letter dated October 8, 1931, from Messrs. Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted and acting under the Reorganization Plan and Agreement on behalf of the holders of $8,783,000 principal amount of the Debentures then on deposit with Bankers Trust Company, as Depositary, Bankers Trust Company, as Trustee, by written demand dated October 8, 1931, receipt of which by National Radiator Corporation was acknowledged October 9, 1931, demanded of National Radiator Corporation the payment of the two instalments of interest due February 1 and August 1, 1931, on its outstanding Debentures, with interest on such overdue instalments of interest at the rate of 6½% per annum up to the date of payment. Bankers Trust Company also, pursuant to such instructions, as Trustee directed its solicitors to institute suit against National Radiator Corporation and has recovered judgment of the whole amount of interest on the Debentures which at the date of such judgment was unpaid. The records of Bankers Trust Company show that none of this interest

has yet been paid, even though the judgment for it was obtained. I have here copies of the Reorganization Committee's letter dated October 8, 1931, addressed to Bankers [fol. 170] Trust Company and Bankers Trust Company's letter of the same date addressed to National Radiator Corporation and by it acknowledged by endorsement dated October 9, 1931, to which letters I have made reference.

Mr. Israels: I offer in evidence the copies of these letters as well as a certified copy of transcript of judgment obtained by Bankers Trust Company for interest on the Debentures.

(Copies of the Reorganization Committee's letter dated October 8, 1931, addressed to Bankers Trust Company, and Bankers Trust Company's letter of the same date, addressed to National Radiator Corporation and by it acknowledged by endorsement dated October 9, 1931, received in evidence as Complainants' Exhibits 18 and 19. A copy of the certified transcript of judgment obtained by Bankers Trust Company October 13, 1931, for $713,944.38 in the action entitled "Bankers Trust Company, Trustee, Plaintiff vs. National Radiator Corporation, Defendant, No. 6776 Law," received in evidence as Complainants' Exhibit 20.)

Q. Has the maturity of the Debentures been accelerated —I mean, has their principal been declared due?

A. Yes. Messrs. Rudolph B. Flersham, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted and acting under the Reorganization Plan and Agreement, on behalf of the holders of $10,092,000 aggregate principal amount of the Deben- [fol. 171] tures then on deposit with Bankers Trust Company, as Depositary, made demand upon Bankers Trust Company, as Trustee, to declare the principal of the entire issue of the Debentures to be immediately due and payable; to demand of National Radiator Corporation the immediate payment of such principal; and, in the event of default in its payment, to institute an action and obtain judgment against National Radiator Corporation for the full amount of such principal, plus such interest on principal as was not represented by the judgment already obtained. I have here a copy of the Reorganization Committee's letter dated

December 24, 1931, addressed to Bankers Trust Company, making such demand. By letter dated December 24, 1931, Bankers Trust Company, as Trustee, acting at the request of these holders of more than one-fourth in principal amount of the Debentures then outstanding, declared the principal of and interest on all of the Debentures to be forthwith due and payable. I have here a copy of that declaration. It was duly delivered to National Radiator Corporation December 26, 1931. On December 26, 1931, the principal of the Debentures having become due by declaration, as I have just said, there was presented to Bankers Trust Company, as paying agent for National Radiator Corporation, for payment, $10,000 principal amount of the Debentures and on that date payment of these Debentures was declined by Bankers Trust Company, as such paying agent for National Radiator Corporation, for the reason that there were no funds on deposit with it with which to make such payment. I produce from the files of Bankers Trust Company copies of the letters dated December 26, 1931, addressed by the Depositary under the [fol. 172] Reorganization Plan and Agreement to Bankers Trust Company, as paying agent for National Radiator Corporation and on the same date addressed by Bankers Trust Company to National Radiator Corporation. The principal and interest of the Debentures being due, and default having been made in the payment of such principal upon presentation of certain of the Debentures for payment, Bankers Trust Company, as Trustee, by letter dated December 28, 1931, receipt of which was acknowledged by National Radiator Corporation on the same date, demanded the payment by National Radiator Corporation of the principal of all the outstanding Debentures, with interest thereon to the date of payment, plus a sum to cover the costs and expenses of collection, including reasonable compensation to the Trustee, its agents, attorneys and counsel, as provided in the Indenture. No part of such sums has, however, been paid. I produce from the files of Bankers Trust Company a copy of the letter dated December 28, 1931, making this demand.

Mr. Israels: I offer in evidence this letter as well as the others referred to by Mr. Meyers.

(Copies of the Reorganization Committee's letter dated December 24, 1931, addressed to Bankers Trust Company, as Trustee, and of the letter of Bankers Trust Company dated December 24, 1931, addressed to National Radiator Corporation, and of the letters of Bankers Trust Company dated December 26, 1931, addressed to said institution as paying agent for National Radiator Corporation, [fol. 173] and addressed to said Corporation, and dated December 28, 1931, addressed to said Corporation and by it acknowledged by endorsement dated December 28, 1931, received in evidence as Complainant's Exhibits 21, 22, 23, 24 and 25.)

Q. Has Bankers Trust Company, as Trustee, taken any further steps by reason of the instructions given it in the Reorganization Committee's letter dated December 24, 1931?

A. Yes. Bankers Trust Company, pursuant to the instructions of the Reorganization Committee, as Trustee directed its solicitors to institute suit against National Radiator Corporation for the full amount of the principal of the Debentures which had become due by declaration. In this suit Bankers Trust Company recovered judgment on December 30, 1931, against National Radiator Corporation for the $10,673,000 principal amount of the Debentures outstanding, with interest on such principal amount from August 1, 1931, to December 24, 1931, plus interest on both such principal and interest from December 24, 1931, to the date of the judgment.

Mr. Israels: I offer in evidence a certified copy of the transcript of judgment obtained by Bankers Trust Company for the principal of the Debentures.

(Certified copy of the transcript of judgment obtained by Bankers Trust Company December 30, 1931, for $10,960,295.83, in the action entitled, "Bankers Trust Company, Trustee, Plaintiff vs. National Radiator Corporation, [fol. 174] Defendant, No. 6851 Law," received in evidence as Complainants' Exhibit 26.)

Q. Have any other proceedings been had, at law or in equity, by Bankers Trust Company, as Trustee, to enforce the payment of the Debentures or to enforce the judgments which it has obtained?

A. I am advised by our counsel that Bankers Trust Company has intervened in the proceedings instituted in the District Court of the United States for the Western District of Pennsylvania by Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted and acting under the Reorganization Plan and Agreement, as Complainants, against National Radiator Corporation, Defendant, and in the various proceedings ancillary to this cause.

Mr. Ludington: I offer in evidence certificates of the Clerks of Court, showing the due appointment and qualification of Robert S. Waters and William G. Heiner as ancillary receivers of the property and business of National Radiator Corporation within the respective territorial jurisdictions of the Courts and on the dates which I will mention, namely:

	In the District Court of the United States for the	By appointment
I	District of New Jersey	October 9, 1931
II	District of Massachusetts	October 20, 1931

[fol. 175]

III	Southern District of Ohio, Western Division	October 22, 1931
IV	Western District of New York	October 23, 1931
V	Northern District of Illinois, Eastern Division	October 23, 1931
VI	District of Maryland	November 5, 1931
VII	Eastern District of Virginia	November 13, 1931
VIII	Eastern District of New York	December 24, 1931
IX	Eastern District of Missouri, Eastern Division	February 15, 1932
	and in the Supreme Court of the District of Columbia	November 30, 1931

(Certificates of the Clerks of the various Courts, showing the due appointment and qualification of Robert S. Waters and William G. Heiner as ancillary receivers, received in evidence as Complainants' Exhibits 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36.)

Mr. Israels: I offer in evidence certified copies of the Intervening Petitions of Bankers Trust Company and of the Answers of National Radiator Corporation to said In-

[fol. 176] tervening Petitions in the various ancillary causes mentioned by Mr. Ludington, other than in the Eastern District of Missouri.

(Copies of the Intervening Petitions of Bankers Trust Company in the various ancillary causes, other than the Eastern District of Missouri, received in evidence as Complainants' Exhibits 37, 38, 39, 40, 41, 42, 43, 44 and 45, and copies of the Answers of National Radiator Corporation to said Intervening Petitions received in evidence as Complainants' Exhibits 46, 47, 48, 49, 50, 51, 52, 53 and 54.)

Q. Will you please state the amount of Debentures on deposit today with Bankers Trust Company, as Depositary under the Reorganization Plan and Agreement?

A. $10,188,500, approximately 95½% of the total issue of the Debentures now outstanding.

Q. At the present date, what is the indebtedness of National Radiator Corporation in respect of its outstanding Debentures under the Indenture?

A. The amount now due upon the Debentures and under the Indenture is as follows:

Amount of judgment for interest	$713,944.38
Amount of judgment for principal and additional interest	$10,960,295.83
	$11,674,240.21

with interest thereon at 6% from the respective dates of entry. Of course, there is also due to Bankers Trust Company, as Trustee, the amount of its compensation, and ex-
[fol. 177] penses, for which application will be made at a later date.

There was no cross examination.

William C. Meyers.

Read and subscribed this 29th day of February, 1932.
J. King Evans, Examiner. (Notarial Seal.)

TESTIMONY OF HAROLD F. LINDER

HAROLD F. LINDER, being first duly sworn, in response to oral interrogatories of counsel for complainants, deposes and says:

Direct examination.

By Mr. Ludington:

Q. Will you please state your name and residence?

A. Harold F. Linder, 245 East 72nd street, in the Borough of Manhattan, City of New York.

Q. What is your business connection?

A. I am an officer of Cornell, Linder & Co., Inc., with office and place of business at 50 Broad street, in the Borough of Manhattan, City of New York.

Q. Are you acquainted with the affairs of National Radiator Corporation?

A. I am to a considerable extent. My associate, Mr. Charles O. Cornell, is a member of the Reorganization Committee constituted and appointed by the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation; and another of my asso- [fol. 178] ciates, Mr. Armand Erpf, is Secretary to this Committee.

Q. I show you a copy of the Reorganization Plan and Agreement dated February 11, 1931, to which you have just made reference, and I ask you if you are acquainted with any of the gentlemen other than Mr. Cornell who are members of the Reorganization Committee constituted thereunder?

A. Yes; I am acquainted with Mr. John H. Waters and with Mr. Rudolph B. Flershem. I also know Mr. Frank B. Cahn, who, by due action of the Reorganization Committee by Minute dated September 17, 1931, was added as a fourth member.

Q. Can you state the residence, citizenship and occupation of any of these gentlemen?

A. Yes. Mr. Rudolph B. Flershem is known to me to be a resident of the City of Buffalo, New York, and is a citizen of that State and Vice-President of the Marine Trust Company of Buffalo, New York. Mr. Charles O. Cornell is known to me to be a resident of Port Washington, Long Island, and is a citizen of the State of New York, and, as I have already said, an associate of mine in Cornell, Linder & Co., Inc. Mr. Frank B. Cahn is known to me to be a resident of the County of Baltimore, Maryland, and a citizen of that State and is an investment banker and member of the firm of Frank B. Cahn & Co.

Q. Can you tell me of the whereabouts of Mr. Armand Erpf?

A. Yes; he is in the employ of Cornell, Linder & Co., Inc., and at the present time is engaged in its interests in Rochester, New York.

[fol. 179] Q. In his absence, who acts as Secretary of the Reorganization Committee?

A. I do. All files and records of the Secretary of the Reorganization Committee are kept at the office of Cornell, Linder & Co., Inc., and in the absence of Mr. Erpf, his duties are performed by me.

Q. You are acquainted with the receivership proceedings which have been instituted against National Radiator Corporation by the Reorganization Committee in the District Court of the United States for the Western District of Pennsylvania and in the various causes ancillary thereto?

A. I am.

Q. I have here a list, which I will read, of the ancillary causes in which the Reorganization Committee has brought its Creditors' Bill against National Radiator Corporation:

	In the District Court of the United States for the	By appointment
I	District of New Jersey	October 9, 1931
II	District of Massachusetts	October 20, 1931
III	Southern District of Ohio, Western Division	October 22, 1931
IV	Western District of New York	October 23, 1931
V	Northern District of Illinois, Eastern Division	October 23, 1931
VI	District of Maryland	November 5, 1931
VII	Eastern District of Virginia	November 13, 1931
VIII	Eastern District of New York	December 24, 1931
IX	Eastern District of Missouri, Eastern Division	February 15, 1932

[fol. 180] and in the Supreme Court of the District of Columbia — November 30, 1931

Can you state whether any other proceedings than those which I have just mentioned have been instituted by the Reorganization Committee?

A. I am advised by counsel that Receivers have been appointed for National Radiator Corporation at the suit of the Reorganization Committee in the Court of Chancery of the State of Delaware, October 9, 1931.

Mr. Ludington: I offer in evidence a certificate of the Clerk of the Court of Chancery for the State of Delaware, showing the appointment of Robert S. Waters and one Robert H. Richards, Jr., as Receivers of and for National Radiator Corporation.

(Certificate of the Clerk of the Court of Chancery of the State of Delaware received in evidence as Complainants' Exhibit 55.)

There was no cross examination.

Harold F. Linder.

Read and subscribed this 29th day of February, 1932.
J. King Evans, Examiner. (Notarial Seal.)

Examiner: Do counsel desire to present any other witnesses at this time?

[fol. 181] Mr. Ludington: I request that the testimony of Mr. Carl E. Resley be taken at Pittsburgh, Pennsylvania, on Wednesday, March 2, 1932, at 10:00 o'clock A. M., at the office of Reed, Smith, Shaw & McClay, in the Union Trust Building, by adjournment with the consent of the parties at this examination and at your direction.

Examiner: I so direct, if the parties consent.

With the consent of all parties and at the direction of the Examiner, it was stipulated and agreed that the testimony of Carl E. Resley be taken on Wednesday, March 2, 1932, at 10:00 o'clock A. M., at the office of Reed, Smith, Shaw & McClay, in the Union Trust Building, Pittsburgh, Pennsylvania, without further notice of such examination to the parties.

Approved.

White & Case, Milbank, Tweed, Hope & Webb,
Arthur E. Goddard, Per Rep. William Shea. J. King Evans, Examiner.

February 29, 1932.

Certificates

STATE OF NEW YORK,
County of New York, ss:

I hereby certify that on February 29, 1932, before me, E. W. Emmens, a Notary Public in and for the County and

State aforesaid, the above named witnesses William C. [fol. 182] Meyers and Harold F. Linder were by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that their depositions were reduced to writing under the supervision of J. King Evans, Esq., as Examiner, and, when completed, read over by said witnesses respectively and subscribed by them in my presence and in the presence of said Examiner and of such of the parties and counsel as were in attendance at the examination of said witnesses; that said examination was conducted as stated in said depositions; that the parties and counsel in attendance at the taking of said depositions were as hereinbefore set forth and that Complainants' Exhibits 1 to 55 attached to said depositions were marked by me for identification as stated in said depositions and, where copies thereof were admitted in evidence, were compared by me with the originals thereof offered in evidence and were found by me to be correct and true copies.

I further certify that I am not of counsel or an attorney for any of the parties nor am I interested in the event of the above entitled cause.

In witness whereof I have hereunto set my hand and official seal this 29th day of February, 1932.

E. W. Emmens, Notary Public. Notary Public, Kings County, No. 139, Reg. No. 3048. Certificate filed in New York Co. No. 89, Reg. No. 3-E-66. Certificate filed in Suffolk County. Commission Expires March 30, 1933. (Seal.)

[fol. 183] I certify the foregoing to be a true and proper transcript of testimony taken before me on Monday, the 29th day of February, 1932, at 10:00 o'clock A. M. at the principal office of Bankers Trust Company, 16 Wall street, in the Borough of Manhattan, City and State of New York, pursuant to the annexed notice duly given in accordance with the requirements of the order of my appointment made in this cause February 19th, 1932.

J. King Evans, Examiner.

Testimony

Testimony on behalf of the complainants, taken at the office of Reed, Smith, Shaw & McClay, in the Union Trust Building, Pittsburgh, Pennsylvania, on Wednesday, March 2, 1932, at 10 o'clock a. m., before J. King Evans, Esq., examiner appointed for such purpose by order of the said court made and entered therein February 19, 1932

Appearances

Reed, Smith, Shaw & McClay, solicitors for complainants; Mr. G. Franklin Ludington for Milbank, Tweed, Hope & Webb, of counsel.

Mr. J. Garfield Houston, solicitor for Bankers Trust Company, Intervenor.

Mr. H. S. Endsley, solicitor for defendant.

Stipulation re Testimony and Exhibits

It is stipulated and agreed by the parties to this cause, without waiving any right to object to the materiality or relevancy of the testimony hereinafter appearing, that:

[fol. 184] (a) All formal notice of the taking of testimony and of the name of each witness whose testimony is to be taken and of the time and place of taking the same, viz.: at the City of New York, New York, at the principal office of Bankers Trust Company, 16 Wall Street, on Monday, February 29, 1932, at 10:00 o'clock A. M., and/or at the City of Pittsburgh, Pennsylvania, at the office of Reed, Smith, Shaw & McClay in the Union Trust Building, on Wednesday, March 2, 1932, at 10:00 o'clock A. M., is hereby waived.

(b) The testimony, by oral interrogatories or in the form of narrative, of William C. Meyers, Carl E. Resley, Harold F. Linder and any other person or persons who may be produced before the Examiner appointed to take the same, may be taken on examination before said Examiner.

(c) Exhibits 1 to 55 attached to the depositions of the witnesses William C. Meyers and Harold F. Linder and respectively certified by E. W. Emmens, as Notary Public, to have been by him compared with the originals offered in

evidence and found by him to be true and correct copies of said originals, and Exhibits 56 to 60 attached to the deposition of the witness Carl E. Resley and certified by Martha R. Holmes, as Notary Public, to have been by him compared with the originals offered in evidence and found by him to be true and correct copies of said originals, may be substituted in the place and stead of said originals, as part of the record in this cause and reference may be made to said Exhibits with the same force and effect as if the originals thereof were made a part of the record in this cause.

[fol. 185] (d) The delivery of said depositions by J. King Evans, Esq., as Examiner, before whom said depositions are taken or the sealing of said depositions by him and the directing of the same to said Court are waived.

(e) Said depositions or any thereof may be read at the final hearing in this cause with the same force and effect as if all formalities of statute or rules of Court in respect of the taking of the same had in all respects been duly complied with.

TESTIMONY OF CARL E. RESLEY

CARL E. RESLEY, being first duly sworn, in response to oral interrogatories of counsel for complainants, deposes and says:

Direct examination.

By Mr. Ludington:

Q. Will you please state your name and residence?

A. Carl E. Resley, Johnstown, Pennsylvania.

Q. What is your occupation?

A. I am Secretary and Treasurer of National Radiator Corporation.

Q. How long have you held those offices?

A. Since August 30, 1927, except for an interval of time between January 1, 1929, and August 4, 1930. Prior to the present receivership of National Radiator Corporation I held those offices at the appointment of its Board of Directors and upon the appointment of receivers October 9, 1931, I entered into their employ and have performed the

duties customarily performed by the Secretary and Treasurer.

[fol. 186] Q. In how far are you acquainted with the affairs of National Radiator Corporation?

A. As Treasurer, I have had general supervision of all records and accounts, and am conversant with the financial affairs of National Radiator Corporation, as well as with the financial transactions carried out by its receivers, since their appointment. As Secretary, I have had charge of the minute books and corporate records of National Radiator Corporation, including its property records and property accounts.

Q. At what date and where was National Radiator Corporation organized?

A. It was organized in 1927 under the laws of the State of Delaware.

Q. Will you please produce from the files of the National Radiator Company a certified copy of its Certificate of Incorporation?

A. I produce from the files of National Radiator Corporation a certified copy of its Certificate of Incorporation, showing it to have been organized in 1927 under the laws of the State of Delaware.

Mr. Ludington: I offer in evidence this certified copy of the Certificate of Incorporation of National Radiator Corporation.

(Copy of Certificate of Incorporation of National Radiator Corporation received in evidence as Complainants' Exhibit 3, being the same copy attached to the Deposition of William C. Meyers, taken in this cause February 29, 1932.)

Q. In what business is National Radiator Corporation engaged?

[fol. 187] A. National Radiator Corporation is engaged principally in the business of manufacturing and selling heating appliances, round and sectional boilers, and hot water and steam radiators.

Q. Will you please state where the principal office of National Radiator Corporation is located and what properties its owns?

A. The principal office of National Radiator Corporation, other than its statutory office in the State of Delaware, is

in the City of Johnstown, Pennsylvania, and a substantial part of its properties are in this State, including two manufacturing plants in the City of Johnstown and a manufacturing plant in the City of New Castle. National Radiator Corporation also owns manufacturing plants in the City of Trenton, New Jersey; in the City of Framingham, Massachusetts; in the Cities of Dunkirk and North Tonawanda, New York; and in the City of Chicago, Illinois. In all of these places National Radiator Corporation owns substantial amounts of property, including real estate, plants and other fixed assets; also stocks of raw materials, materials in process of manufacture and finished products. National Radiator Corporation also own warehouses in the Cities of Baltimore, Maryland; Cincinnati, Ohio; Washington, D. C.; Richmond, Virginia; and Garden City, New York; wherein are stored finished products and other property.

Q. Can you offer a detailed description of the real properties which you have mentioned?

A. I have here a document entitled "Schedule of Property Owned by National Radiator Corporation and/or its [fol. 188] Receivers," which is Schedule A to the proposed "Final Decree of Sale" which counsel have prepared and is intended to show "Property owned by National Radiators and/or the Receivers which is to be sold under the foregoing Decree."

Q. How do you know this to be an accurate description in detail of the real estate of National Radiator Corporation?

A. Because I have custody of the property records of National Radiator Corporation and of all of its deeds and leases, and I have myself checked the description of all such real estate as shown by this Schedule with those deeds and with our property records.

Mr. Ludington: I offer in evidence this Schedule of Property owned by National Radiator Corporation and/or its Receivers.

(Copy of said Schedule of Property owned by National Radiator Corporation and/or its Receivers received in evidence as Complainants' Exhibit 56.)

Q. Where is the greater part of the real properties of National Radiator Corporation located within the State of Pennsylvania?

A. I should say at New Castle, since on the books of National Radiator Corporation the plant located at New Castle shows the greater value of all real properties within this State and in its actual physical extent it is also greater than the plant at Johnstown.

Q. In what county is the New Castle plant and real property?

A. In Lawrence County, Pennsylvania.

[fol. 189] Q. Is the New Castle plant greater than any of the other plants?

A. Yes, its inventory value is greater than any of the others.

Q. Can you tell me what its inventory value is?

A. I can, as of October 8, 1931.

Q. What is, then, the inventory value of the New Castle plant as of October 8, 1931?

A.—

Land	$87,350.00
Buildings	790,302.67
Total (after depreciation)	$877,652.57

Q. What is the valuation of the next largest plant?

A. By the inventory figures of October 8, 1931, I should say, Johnstown, Pa.:

Land	$9,500.00
Buildings	500,175.40
Total (after depreciation)	$509,675.40

Q. Will you please state the inventory values at October 8, 1931, of the other large plants?

A. At Trenton, N. J.:

Land	$92,507.96
Buildings	411,395.22
Total (after depreciation)	$503,903.18

At Chicago, Ill.:

Land (plant)	$120,060.59
Buildings (plant)	320,335.55
Edgewater Apartment Hotel	51,172.31
Total (after depreciation)	$491,568.45

[fol. 190] At Framingham, Mass.:

Land	$57,500.00
Buildings	281,238.00
Total (after depreciation)	$338.738.00

Q. Has National Radiator Corporation any property located in the State of Delaware?

A. No. National Radiator Corporation has never owned and does not own any property or assets located within the State of Delaware.

Q. Are you acquainted with the execution and delivery by National Radiator Corporation of its Indenture dated August 1, 1927, made with Bankers Trust Company, as Trustee?

A. I am.

Q. Has National Radiator Corporation in its possession an original counterpart of that Indenture?

A. It has.

Q. Will you please produce from the files of National Radiator Corporation such original counterpart?

A. I produce from the files of National Radiator Corporation an original counterpart of the Indenture dated August 1, 1927, between National Radiator Corporation and Bankers Trust Company, as Trustee.

Q. Are you acquainted with the persons whose names are subscribed to that counterpart and can you identify their signatures?

A. I am acquainted with the signatures of Mr. Lawrence M. Bament and Mr. Vincent W. Westrup, whose names appear upon this counterpart as President and Secretary, respectively, of National Radiator Corporation, and I know [fol. 191] Mr. Bament to have been President and Mr. Westrup to have been Secretary of National Radiator Corporation at the time this Indenture was executed, and I

know the signatures appearing on this counterpart of this Indenture to be their true respective signatures.

Q. Is the corporate seal of National Radiator Corporation affixed to this counterpart its true and proper corporate seal?

A. It is.

Mr. Ludington: I offer in evidence this original counterpart of the Indenture dated August 1, 1927, between National Radiator Corporation and Bankers Trust Company, as Trustee.

(Copy of the Indenture dated August 1, 1927, between National Radiator Corporation and Bankers Trust Company, as Trustee, received in evidence as Complainants' Exhibit 1, being the same copy attached to the Deposition of William C. Meyers, taken in this cause February 29, 1932, and in said Deposition and hereinafter in this Deposition referred to as the "Indenture.")

Q. Will you please state the principal amount of Debentures originally issued under the Indenture?

A. $12,000,000.

Q. Will you state what amount of those Debentures are now outstanding?

A. Yes. There are outstanding at the present time $10,673,000 principal amount of Debentures of National Radiator Corporation, which were issued on or about August 30, 1927, under its Indenture dated August 1, 1927, [fol. 192] made to Bankers Trust Company, as Trustee. Of the $12,000,000 principal amount of Debentures originally issued $1,169,000 principal amount were delivered by National Radiator Corporation from time to time to Bankers Trust Company, as Trustee, for cancellation in lieu of the semi-annual sinking fund payments provided for in the Indenture. $158,000 additional principal amount of the Debentures were also purchased by National Radiator Corporation and were for a time held in its treasury. These have, however, recently, been cancelled and delivered to Bankers Trust Company, as Trustee, for cancellation.

Q. Will you please state under what circumstances the original issue of $12,000,000 principal amount of Debentures was made?

A. Yes, On August 30, 1927, National Radiator Corporation by its proper officers and pursuant to due authorization of its Board of Directors, executed and delivered to Bankers Trust Company for authentication, Debentures in temporary form for an aggregate principal amount of $12,000,000. These Debentures were authenticated by Bankers Trust Company as Trustee, and were then delivered to the various corporations, which at that time became constituent parts of National Radiator Corporation, in part consideration for deeds and bills of sale and assignments conveying their properties and assets to National Radiator Corporation.

Q. Are the properties which were so conveyed by those constituent corporations substantially the same as the present properties of National Radiator Corporation?

[fol. 193] A. They are, except that the fixed properties of the Utica Heater Corporation have since been sold and are no longer owned by National Radiator Corporation.

Q. Are these Debentures which you mention those which are now outstanding?

A. Yes, except that the temporary Debentures originally issued were surrendered and in their stead National Radiator Corporation duly executed and delivered to Bankers Trust Company, as Trustee, for authentication and delivery by it definitive Debentures of the form now outstanding, having affixed to them the coupons for interest payable February 1 and August 1 in each year, and such definitive Debentures were delivered in exchange for the temporary Debentures of the same issue.

Q. Are you acquainted with the default which has now occurred in payment of interest on the Debentures as well as their principal which has now become due by declaration?

A. I am.

Q. Has anything been paid on these Debenture since August 1, 1930?

A. No; except for a setoff claimed by The First National Bank of Cincinnati in respect of coupons due February 1 and August 1, 1931, appertaining to $68,000 principal amount of Debentures held by that institution.

Q. To what extent were these coupons paid?

A. They were paid to the extent of $4,420, by setoff against a deposit of $10,000 which National Radiator Corporation had with The First National Bank of Cincinnati.

[fol. 194] Q. Why was this setoff permitted?

A. It was ordered by the United States District Court for the Southern District of Ohio, by an order made and entered in that Court December 8, 1931. I have here a copy of that order.

Mr. Ludington: I offer the same in evidence.

(A copy of the order made and entered December 8, 1931, in the United States District Court for the Southern District of Ohio, received in evidence as Complainants' Exhibit 57.)

Q. Do you know Mr. John H. Waters?

A. I do.

Q. How do you come to know him?

A. He has for many years been the chief executive officer of National Radiator Corporation with which I also have been connected.

Q. Do you know where he lives and whether or not he is a citizen of the State of Pennsylvania?

A. Mr. Waters is a resident of the City of Johnstown and a citizen of the State of Pennsylvania.

Mr. Ludington: That is all.

There was no cross examination.

Mr. Ludington: With the permission of the Examiner, I would like to put in evidence in connection with the deposition of Mr. William C. Meyers, taken before you February 29, 1932, certified copy of the petition of Bankers Trust Company for leave to intervene in the receivership pro-

[fol. 195] ceedings pending in the District Court of Missouri, Eastern Division, and certified copy of the intervening petition of Bankers Trust Company filed in the same ancillary cause, and a certified copy of the answer of National Radiator Corporation to said intervening petition.

(Copy of the petition of Bankers Trust Company for leave to intervene, of its intervening petition, and of the

answer of National Radiator Corporation filed to said intervening petition in the District Court of the United States for the Eastern District of Missouri, Eastern Division, received in evidence as Complainants' Exhibits 58, 59 and 60.)

Carl E. Resley.

Read and subscribed this 2nd day of March, 1932. J. King Evans, Examiner. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

PETITION OF INTERNATIONAL HEATER COMPANY FOR LEAVE TO INTERVENE—Filed March 31, 1932

The petition of International Heater Company, praying for leave to intervene in the above entitled suit, respectfully represents:

1. That your petitioner is and at all the times hereinafter mentioned was a corporation organized and existing under [fol. 196] the laws of the State of New York and having its principal business office in the City of Utica, N. Y., and that it is a citizen of the State of New York.

2. That your petitioner is the owner and holder of three promissory notes made by National Radiator Corporation, the defendant above named, for $20,000.00 each, copies of which notes are hereto annexed, marked "Exhibit A" and made a part hereof; and that your petitioner has filed a proof of claim upon said notes with the receivers in this suit, and said claim has been allowed by them in the amount of $60,000.00.

3. That your petitioner did not see the bill of complaint herein or a copy thereof until on or about March 18, 1932; that said bill of complaint contains many allegations which your petitioner is informed and believes to be untrue but which the defendant above named has not denied in its answer but has admitted; and your petitioner is informed and verily believes that such admissions are collusive and for the purpose of inducing this court to direct the receivers to follow such a procedure as will enable the com-

plainants and defendant to carry out their so-called Reorganization Plan without regard to the defendant's creditors who are not parties to said plan.

4. That your petitioner has also learned on or about March 18, 1932, that the complainants have presented to this court a proposed decree and requested the court to direct a sale of the assets of said National Radiator Corporation practically as an entirety and in such a manner [fol. 197] as would practically destroy the rights of all creditors not parties to said so-called Reorganization Plan.

5. Upon information and belief, that the receivers herein have done nothing to protect the rights of the creditors not parties to the said Reorganization Plan; that they have had no appraisals made nor made any investigation to ascertain what the properties of the said National Radiator Corporation would sell for if sold separately; that they have had no disinterested advice, legal or otherwise; that one of the receivers is so much interested in said Reorganization Plan that he is not in a position properly to protect the rights of the creditors not parties to said plan and has made no effort to provide such protection, and that the other receiver is a lawyer and inexperienced in the business conducted by said corporation; and that the rights of your petitioner and other creditors similarly situated are therefore left entirely unrepresented and unprotected except so far as they are protected by the court; and that the court could protect the rights of your petitioner much more fairly and adequately if your petitioner were a party to this litigation and thus in a position properly to present its evidence.

6. That if the property of said National Radiator Corporation is sold practically as an entirety as now proposed by the receivers without any adequate investigation as to its value or any effort to see how they could dispose of i so as to receive the greatest amount possible, your petitioner and all creditors similarly situated will suffer a great [fol. 198] and irreparable loss, for which they have no adequate remedy at law or otherwise, and your petitioner will be deprived of its interest in the assets of said National Radiator Corporation without a hearing, without opportunity to present its evidence and without due process of law.

Wherefore your petitioner prays that it may be made a party defendant to this suit and allowed to intervene and defend the same; or that it be permitted to file a bill of intervention and have such other and further relief as may be just and equitable.

Alter, Wright & Barron, Attorneys for Petitioner.
Miller & Hubbell, Utica, New York, of Counsel.

EXHIBIT "A" TO PETITION

20,000.00. Johnstown, Pa., December 31st, 1928.

Three Years after date we promise to pay to the order of International Heater Company, Inc., Utica, New York, at The United States National Bank of Johnstown, Twenty Thousand and No/100 Dollars, without defalcation, for value received, with interest at six per cent per annum.

National Radiator Corporation, by Carl E. Resley, Treasurer.

[fol. 199]

20,000.00 Johnstown, Pa., December 31st, 1928.

Four Years after date We promise to pay to the order of International Heater Company, Inc., Utica, New York, at The United States National Bank of Johnstown, Twenty Thousand and No/100 Dollars, without defalcation, for value received, with interest at six per cent per annum.

National Radiator Corporation, by Carl E. Resley, Treasurer.

20,000.00 Johnstown, Pa., December 31st, 1928.

Five years after date We promise to pay to the order of International Heater Company, Inc., Utica, New York, at The United States National Bank of Johnstown, Twenty Thousand and No/100 Dollars, without defalcation, for value received, with interest at six per cent per annum.

National Radiator Corporation, by Carl E. Resley, Treasurer.

Duly sworn to by Irving L. Jones. Jurat omitted in printing.

[fol. 200] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING INTERVENTION

And now, to wit, March 31st, 1932, the above petition of the International Heater Company praying for leave to intervene in the above action is filed and, upon consideration, the prayer of the petitioner is granted and the International Heater Company is permitted to intervene as a party to the said suit in accordance with Rule 37 of the Equity Rules. Notice of this order to be given plaintiffs and original defendants in this action.

Per Curiam.

G.

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY—Filed June 1, 1932

And now, to-wit, Thursday, March 3, 1932, at 10:45 o'clock A. M., the above entitled matter came on to be heard, before Hon. Robert M. Gibson, Judge, at Pittsburgh, Pennsylvania.

[fol. 201] Counsel present:

For Complainants: Messrs. Reed, Smith, Shaw & McClay (by Maynard Teall, Esq.), Lawrence Bennett, Esq., and G. Franklin Ludington, Esq., of counsel.

For Defendant: H. S. Endsley, Esq.

For Bankers Trust Company, Intervenor: J. Garfield Houston, Esq.

For First National Bank of Cincinnati, Petitioner to Intervene: Messrs. Ehrich, Royall, Wheeler & Walter (by Ralph Royall, Esq.), Messrs. Baker & Watts (by Horace F. Baker, Esq., and Sidney J. Watts, Esq.).

Harriet Cole Thomas, Official Reporter.

(Mr. Teall outlines complainants' position on the issue involved herein, to the Court.)

Mr. Teall: If the Court please, we first offer the testimony taken before the Examiner, Mr. J. King Evans, appointed by your Honor to hear witnesses outside of Court.

Mr. Royall: My position is a bit anomalous, your Honor. I don't want to make it inconvenient for the other side, except I want to be protected. Now, this may or may not be objectionable. I do not understand your Honor has ruled yet upon our petition to intervene. If it is objectionable, have I, even with a status as a party here, the right to make objection? How are we going to overcome this anomalous position?

[fol. 202] (Above matter discussed informally, pro and con, by counsel and the Court.)

(Recess taken until 1:30 o'clock p. m.)

Afternoon Session

(Informal discussion on pending matter continued.)

Whereupon the following order was made by the Court:

"Order Making First National Bank of Cincinnati, Ohio, Party Defendant

And now, to-wit, this 3rd day of March, 1932, the petition of First National Bank of Cincinnati, Ohio, verified December 26, 1931, and filed herein on February 17, 1932, having come on to be heard, and the Bankers Trust Company, as Trustee, and the complainants and the defendant having consented in open Court to the granting of the prayer of said petition and to the making of this order, now, therefore, upon consideration thereof, on motion of counsel for petitioner.

It is ordered that the First National Bank of Cincinnati, Ohio, be and it is hereby made a party defendant to this cause, but in subordination to and in recognition of the propriety of the main proceeding.

Per Curiam.

G."

[fol. 203] Testimony of E. F. Wainwright

E. F. Wainwright, a witness produced on behalf of complainants, having been duly sworn, testified as follows:

Direct examination.

Mr. Teall:

Q. Mr. Wainwright, what is your occupation?

A. Bond salesman with H. M. Bilsbee & Company.

Q. How long have you been in that business?

A. About three and a half years.

Q. Do you keep in touch with the market value of bonds and stocks and other securities that are bought and sold on the Exchange and on the open market?

A. I do.

Q. Are you familiar with the debentures of the National Radiator Corporation?

A. Fairly familiar, yes, sir.

Q. State whether or not, if you know, those debentures are listed on the New York Stock Exchange?

A. They are.

Q. And have been for how long, or approximately how long?

A. Approximately since their issue in 1927.

Q. Have you examined into the records and informed yourself of the prices at which those debentures had sold on the New York Stock Exchange over a period of time?

A. I have.

Q. What period of time?

[fol. 204] A. Checked back through to around the middle of 1930, that is, in specific months; and prior to that, I have the general approximate price of them.

Q. Down to the present time?

A. Correct.

Q. Well, will you give us the information and knowledge you had as to the selling price of these debentures on the Exchange from, say, the middle of 1930, when you began your examination, down to the present time?

Mr. Royall: I object to that, if your Honor please. It is too well known for argument that when once a receivership has been had, market value of securities ceases to be a value of the property; it is immediately disparaged by the receivership. Courts in receivership proceedings in protecting the stockholders do not take market values as affected by a receivership. They are not a normal value. I object to the question.

The Court: The market value is under the disparagement of the receivership now, isn't it? Our main inquiry now, as I take it, is as to what they are worth.

Mr. Royall: Quite true, what they are worth. But the question of what securities may sell for on the stock exchange after receivership is not a criterion of the value of properties in receivership.

[fol. 205] The Court: That is true. I will receive it over the objection, and note an exception.

A. Approximately the middle of 1930, these bonds sold around 20. They dropped in the latter part of 1930 to a low of 14, and had a high in 1930, in the latter part of the year, up to 25. In 1931 they reached a low of 11 and a high of 25⅞. And up to the present time in 1932 they have had a high of 14, and a low of 8. That, of course you understand, means $80 per $1,000 bond.

Cross-examination.

Mr. Royall:

Q. Have you investigated to see what the prices were earlier than in December of 1930?

A. Yes, sir; I can give you an approximate market value of that.

Q. Can you go back to the issue price in 1927?

A. The issue price was originally par.

Q. They were marketed at the issue at that price?

A. I presume so.

Q. Well, don't your investigations lead you to believe so? The same kind of investigation that you testified to on your direct examination—you could base a reply upon that, could you not?

A. Yes, sir.

Q. And your reply is that they did sell in August, 1927, at par. Is that right?

A. That is correct.

[fol. 206] TESTIMONY OF ROBERT S. WATERS

ROBERT S. WATERS, a witness produced on behalf of complainants, having been duly sworn, testified as follows:

Direct examination.

Mr. Teall:

Q. Mr. Waters, you are one of the two receivers of the National Radiator Corporation?

A. I am.

Q. And what was the date of your appointment?

A. October 9, 1931.

Q. Mr. William G. Heiner is the other receiver?

A. He is.

Q. State whether or not you and Mr. Heiner are receivers in various ancillary jurisdictions also?

A. We are.

Q. Prior to your appointment as a receiver, were you connected with the company?

A. I was, yes.

Q. For how long?

A. Since its organization in 1927.

Q. What was the nature of your connection with it prior to receivership?

A. I was vice-president and general manager of manufacture.

Q. You said the company was organized in 1927?

A. It was.

Q. Will you give us in a general way the component elements of the new company that was organized at that time? [fol. 207] A. You mean by that what the plants consisted of that were put in the organization?

Q. I mean the companies that were combined into this company?

A. The old National Radiator Company, Guerney Heater Company, the Niagara Boiler & Radiator Company, Utica Heater Company, Continental Heater Company, Union Radiator Company.

Q. Now, what, in a general way, is the business of this concern?

A. Manufacturing and selling of boilers and radiators for heating purposes.

Q. The manufactured goods that you may have on hand at any time, do they have distinctive characteristics, or are all radiation and all boilers of all manufacturers alike in a general way?

A. No; each manufacturer's product is distinctive in type and design, usually to produce the same result, that is, from the standpoint of heating.

Q. If you know, state whether or not your radiation would be interchangeable with radiation of other concerns in the same business?

A. No, it would not.

Q. Now, where does most of your radiation go—into buildings?

A. The majority of it is sold for residential house heating purposes.

Q. What percentage, if you can tell us, of your product goes into residential buildings?

A. I should say approximately sixty-five or seventy per cent.

Q. And the balance goes into what kind of buildings?

[fol. 208] A. Office buildings, hotels, hospitals, factories.

Q. Do you keep yourself informed as to activity in the building and construction business?

A. We do.

Q. And do you personally keep yourself in touch with that?

A. I do.

Q. In what way?

A. Through studying the building statistics that are issued by the Department of Commerce and the building permits published by the Department of Labor.

Q. And I suppose you converse with people in the trade and with your own salesmen and employees?

A. We do.

Q. At the present time is the building business good or bad?

A. Very bad.

Q. When did it become bad? Was there any definite time there was a change?

A. Beginning in 1928, the aggregate square feet of floor space for residential buildings started to decline. The decline mounted to about thirty per cent between 1928 and 1929; between 1928 and 1930 it was approximately sixty per cent; and last year the reduction below the peak of '28 was about sixty-six per cent; and that is the business that we depend upon largely for our business.

Q. Is the curve at the present time upward or downward, or is the line horizontal?

A. The forecasts of the F. W. Dodge Corporation are usually studied by the people in this industry to obtain an [fol. 209] idea of the trends. The curves—or the forecast for this year indicates that there will be about $180,000,000 in residential building, which is about ten per cent below the amount a year ago for the same quarter, that is, the first quarter of 1932.

Q. From which you would infer that the line is still horizontal, or the curve still downward or turning up—which?

A. Still downward.

Q. I believe you testified this company was organized in August of 1927? Am I right?

A. Yes, sir.

Q. Now, what has been the history of the concern since that time, from the standpoint of profits or losses, if you know?

A. The last four months of 1927, the corporation showed a profit of around $993,000. Beginning with 1928, and continuing up to and including 1931, the losses were around $1,250,000 or $1,300,000 per year.

Q. Have you ever had the full period of one year which showed a profit since the organization of the company?

A. We have not.

Q. It has been a loss every year, and you have just given some figures for losses. Do those figures include deduction for depreciation?

A. They do.

Q. Mr. Waters, I suppose that you have visited all the plants of this company, and are generally familiar with them?

A. I have, yes.

Q. Now, you may follow, if you like, in answering these [fol. 210] questions, Schedule "A" in the proposed decree, if that will refresh your recollection any. I should like to ask you what plants and properties the Corporation has in Western Pennsylvania? (Page 47 of proposed decree.)

A. We have two plants in Johnstown, each occupying about three acres of area, consisting of a radiator plant, plant for manufacturing radiation, having a core room, foundry, cleaning room, testing room, boring or machining, assembling, shipping, and the usual machine shop. One plant known as the National plant, having a capacity of nine million feet of radiation, melting capacity of eighteen

tons an hour. The Union plant has a radiator capacity of about three million feet—this is cast iron radiation—can melt around twenty-one tons an hour. The general office of the Corporation is located in Johnstown, occupying about a quarter of an acre in area, two-story brick building—that is, the lot. These plants are equipped with machinery for manufacturing radiation.

Q. That is what you have at Johnstown. Now, what do you have at New Castle?

A. There are two plants there, one for the manufacture of radiation and the other for the manufacture of boilers, both occupying a plot of ground about nineteen acres. The boiler plant can produce 31,000,0000 pounds of boilers a year, and the radiator plant is large enough to produce around 11,000,000 feet radiation. The tonnage in the radiator plant is around eighteen tons an hour, 91-inch cupola, and in the boiler plant we can melt thirty-four tons an [fol. 211] hour—there are two cupolas there. The boiler plant is equipped with machinery, and patterns and flasks, and boiler equipment for producing cast iron boilers. The radiator plant does not have equipment for producing radiation with the exception of the cupola, core ovens and some small pattern equipment and a few flasks.

Q. What do you have in Trenton, New Jersey?

A. Plant in Hamilton Township, right outside of Trenton, occupies around 11½ acres; that is the ground area, the plant itself does not occupy the entire amount. It is capable of producing twelve million feet of radiation. That would be the capacity per year. The tonnage that could be melted in the plant is about fifty tons an hour. There are fourteen dwelling houses near the plant, occupied by the employees at the plant. Equipment in the plant consists of the usual machinery and equipment, patterns and flasks for the manufacture of cast iron radiation.

Q. What do you have at Framingham, Massachusetts?

A. Plot of ground approximately twenty-three acres, plant which is capable of producing around five million feet of radiation a year, approximately ten million pounds of boilers. We can melt thirty-six tons of iron an hour in the cupolas at that plant. We have in there a limited amount of equipment for producing radiation. The product produced at Framingham was discontinued after consolidation, and the equipment, such as flasks and some molding ma-

chines were utilized in producing a standard product adopted at that time. There were no boilers produced by [fol. 212] the Guerney Manufacturing at this time or since the consolidation.

Q. What do you have in western New York?

A. In western New York there are two properties, one at North Tonawanda, about ten acres of ground, with a plant which is capable of producing around three to four million feet of radiation and about—no, about eight million feet of radiation and about ten million pounds of boilers. At Dunkirk, New York, there are two plants, one for producing radiation and the other boilers. The radiator plant has a capacity of around six million feet per year, and the boiler plant around twenty million pounds. The usual equipment is there, with the exception of that equipment that was moved to New Castle, the boiler equipment moved to New Castle in 1929, when we suspended operations at Dunkirk.

Q. What do you have at Chicago?

A. In Chicago we have a plant capable of producing around five million feet of radiation, melting twenty-one tons of iron per hour, on a ten-acre plot of ground.

Q. When you say five million feet of radiation, you mean five million feet of radiation per what?

A. Per year. That is our yearly capacities I am giving you.

Q. Do you have a warehouse?

A. Warehouse in Chicago also, containing about 28,000 square feet, the square area, frame for stacking radiation, boilers, and some small assembling equipment, such as assembling drill presses.

Q. What do you have at Baltimore?

[fol. 213] A. We have a warehouse at Baltimore, containing around 13,000 square feet of floor area, and the usual standardized frame for stacking radiation and boilers.

Q. Is that all?

A. That is all in Baltimore.

Q. At Cincinnati?

A. A small warehouse, containing around 10,000 square feet of floor area and the usual equipment.

Q. Richmond, Virginia, do you have some property there?

A. We have a warehouse there containing around 11,600 square feet of floor area and usual warehouse equipment.

Q. In Garden City, New York, what properties have you?

A. In Garden City, New York, we have two warehouse buildings, with a floor area aggregating about 21,000 square feet, wooden frame construction.

Q. At Washington, D. C.?

A. At Washington, D. C., we have a warehouse containing around 14,000 feet of floor space and the usual stocking equipment.

Q. I believe you did not mention an apartment house, or some piece of property of that nature, in Chicago.

A. Edgewater Beach Apartment House—Apartment Hotel, that is; it was taken over by the Corporation for debt. Five-story building, brick construction.

Q. Does that apartment house produce any income?

[fol. 214] A. Some, yes, but hardly enough to take care of the taxes and back interest on the bonds.

Q. Now, I supopse you also have unfinished material and goods in process, and finished goods, on hand and in your inventory?

A. We do.

Q. And some accounts receivable?

A. Yes.

Q. And cash?

A. Yes, sir.

Q. And some investments that the Court has permitted to be made by its order?

A. Right.

Q. Now, have we been over in a general way, then, all the property of the company?

A. We have.

Q. And you can particularize as much as you like as to their plants—state whether or not your machinery is adaptable to other uses than the manufacture of your product?

A. The plants, both radiator and boiler plants, are essentially laid out and equipped for the production of cast iron boilers and radiators. The cupolas, for instance, melt iron; they can be used for melting iron in any plant, and for any purpose, up to the capacities of these cupolas, but the nature of the foundry in which the iron is melted is such that you are limited to the size casting that you can produce, by reason of the fact that you don't have crane equipment which could handle heavy castings. By "heavy castings" I mean castings weighing several tons.

Q. In a general way, answer this question: Is the ma-
[fol. 215] chinery of this company of such nature that it could be devoted readily to uses other than that to which it is now devoted?

A. No, it could not.

Q. What about the plants themselves, the buildings?

A. The buildings could be utilized for jobbing foundry work. You would then be confined to small castings, lighter castings, than the usual job foundry will handle.

Q. Of course, you would have to put in appropriate machinery for that business?

A. Yes: your patterns and flasks that are used for producing boilers and radiators could not be utilized for any other purpose, except a rare exception, I would say.

Q. Which of the plants are now in operation and which are not in operation?

A. There are only two plants operating. By "operating" I mean pouring iron. The New Castle plant and the National plant at Johnstown.

Q. That is, one of your two Johnstown plants is in operation and your New Castle plant is in operation?

A. Yes. The other Johnstown plant is used as a warehouse and as an equipment plant for producing equipment used in our business.

Q. Which of your plants are shut down?

A. The plant at Framingham; the Trenton plant; the North Tonawanda plant is leased to the Lincoln Niagara Company; the two plants at Dunkirk are down, and the Chi-
[fol. 216] cago plant is down. By "down" I mean we are not pouring iron at those points, we are utilizing them as a warehouse only.

Q. Did the receivers close down the plants that are now closed?

A. No, sir; they were closed before we were appointed receivers.

Q. And you have simply left them down?

A. We have, because there has not been sufficient demand to justify opening them up.

Q. You have been able, with the two plants in operation, to produce all that you could sell?

A. All that we could sell, yes, sir.

Q. Can you tell us how long those plants have been closed?

Q. North Tonawanda was closed in September, 1927; Chicago was closed in July, 1929; pouring of metal was

suspended at Union in June, 1929; operations were suspended at Dunkirk in the spring of 1930; at Trenton operations were suspended in June of last year, '31.

Q. Can you give the Court any idea, Mr. Waters, of the cost and expense the receivers have been put to in maintaining these closed plants?

A. All of the plants——

Q. You don't need to take time for an exact figure, just an approximate figure.

A. The cost of our idle plants and the unabsorbed burden on the operating plants amounts to approximately a half million dollars a year.

Q. Prior to the receivership, did you make any effort to dispose of any of these plants that are now idle?

[fol. 217] A. Yes, we did.

Q. What did you do?

A. We tried several different methods of selling the plants. I will briefly comment on each plant and what we did. The Framingham plant was listed with the Edison Electric Illuminating Company at Boston for sale in 1930——

Mr. Royall:

Q. You mean listed for sale with them?

A. As available for sale, if they had any inquiries, as they frequently do—utility companies. We had some correspondence with a realtor by the name of W. W. Willson, of Wallaceton, Massachusetts, who had an inquiry regarding a plant; nothing came of it. In April, 1931, I arranged with a Mr. C. H. Lewis, of Cleveland, to try to organize a company to take over the Framingham plant and the North Tonawanda plant. He had a ninety-day option, and it was extended four months from May 1st. Mr. Lewis had considerable experience in disposing of properties and disposed of some rather large industrial plants from time to time, including one radiator plant back in 1923, I think—'22 or '23. We also arranged with Joseph Holfelder, formerly in charge of our foundry at Trenton, superintendent of the foundry at Trenton, to try and organize capital in Framingham to take over the plant. Mr. Holfelder had previously been in charge of the Framingham plant during the days it was operated by the Guerney Company. He was unsuccessful—in fact, he died just a few months ago.

At Johnstown we endeavored to sell the residence properties there, consisting of a double house and two single [fol. 218] houses; in 1930 had the matter up with the Cambria Realty & Mortgage Company; the property is still in their hands for sale. At Trenton we endeavored to sell, or rather, listed the residence properties there for sale with W. M. Dickinson Company, in January, 1930.

Q. Residence properties or general properties?

A. Residence properties; the plant was then operated. In Chicago the plant was listed with the Central Bank, in 1930. We had some discussion with a metallurgist, Dr. F. W. Myer, about leasing the foundry in April, 1931. The plan he had in mind did not materialize, so he did not, of course, lease the plant. Dunkirk plant was listed with the Industrial Department of the New York Central Railroad in May, 1930; also, of course, with the Chamber of Commerce at Dunkirk. And during 1930, and extending, I believe, into '31, we had some discussion with representatives of the Dunkirk Radiator Company, who were interested in leasing the plant for a concern that was going to make an electric alloy steel; nothing resulted from it. All of the idle plants were listed with the Appel Company, Cleveland—well, I won't say "listed"; we discussed, I should say, with the Appel Company, of Cleveland, realtors, ways and means of disposing of all of the idle plants, in April, 1931. We were not able to get together with them, because they insisted we put up a considerable sum of money in helping promote the sale of the properties. In 1931, the latter part of the year, we discussed the question again with the representative of the company, by the name of V. Dudas. That briefly will give you an idea of [fol. 219] what we have done to try and dispose of the property.

Mr. Teall:

Q. Is it correct to say, then, that over the period of perhaps a year and a half you have made an effort to dispose of all these various idle plants, and that you have not been able to do so?

Mr. Royall: I object to that, if your Honor please, as a mere summarization of testimony; the opposite deduction may be drawn.

The Court: He has already testified as to the specific matter in connection with it. I will sustain the objection.

Q. Can you give us any idea of the number of different articles that your inventory consists of?

A. In the case of radiators, we produce and manufacture seven distinct types of radiation, which would be assembled into forty some different sizes, the constituent parts of which exceed some four hundred items. In the case of boilers, there are sixty types of boilers, which can be produced in around six hundred sizes, and the parts amount to around thirty-two hundred different parts. Then we produce cast iron condensing and cooling coils used in oil refinery work and by-product coke plant work, and matters of that kind, sixty some parts there. We produce a cast boiler in one size, one series consisting of ten sizes, probably two hundred different parts in that. We market a steel boiler, manufactured for us at Lebanon, made in [fol. 220] twenty-two sizes and great widths, varying from thirty-seven inches to eighty-five inches. Those boilers are electric welded, steel boilers, and produced as smokeless boilers, straight fire boilers, and boilers suitable for oil burning and stoker fire burning.

Mr. Royall:

Q. May I ask where those steel boilers are produced?

A. They are produced in Lebanon, Pennsylvania.

Q. By the National Radiator Company?

A. By another company. We are selling them, the National Radiator Corporation is selling them.

Mr. Teall:

Q. Now state whether or not it is necessary to have all these parts on hand for the purpose of supplying them if people's radiation purchased from you gets out of order or broken, or anything of that sort?

A. In other words, it is necessary, to succesfully market radiators, that you have a balanced stock. By "balanced stock" we mean these radiators of various balanced widths and heights in stock, in the proper proportion to the sales of those various sizes. If you don't, you get an order that calls for 36 inch, 5 tube radiation, and on the same order you will get an inquiry for 20 inch 5, some 16½-7, and

some 30 inch 4—Now, if you can't furnish all of those parts for radiators, in those sizes, they just simply won't take the order from you, they will go elsewhere, where they can get a complete and finished order. The same thing applies to boilers. If you can't furnish a complete boiler with an [fol. 221] order calling for radiation boiler, the customer will go elsewhere.

Q. Now, I may have asked this question before—I don't recall: Will these parts that you have on hand go into the radiation of other manufacturers, or are the parts only usable for radiation that you have installed?

A. They can only be used in radiation of our own manufacture; and the same holds true with boilers.

Q. Is that characteristic of the industry as a whole?

A. Yes, it is.

Q. That the goods made by one are not usable in connection with the goods made by another manufacturer?

A. That is correct.

Q. How many salesmen do you have in your employ?

A. As of the first of this year we had 141.

Q. Is that more or less than you had prior to the receivership?

A. In 1929 we had 246 in the sales organization, and in 1930, 181.

Q. Can you give the Court any idea of your expense of sales?

A. The selling expense, including advertising, last year, '31, amounted to $726,000. In 1930 it was $1,038,000; in 1929, it was $1,320,000.

Q. Your sales expense then is still over a million dollars a year?

A. It has been, yes.

[fol. 222] Q. Now, suppose that the National Radiator should go out of business, and not manufacture any more parts of any more radiation, what effect, if any, would that have on your inventory, as to whether it was obsolete or not obsolete, or salable or otherwise, in your opinion?

Mr. Royall: I object to this hypothetical question, as incompetent, irrelevant and immaterial, and not qualified as a proper expert to answer it.

The Court: I will overrule the objection, and note an exception.

Q. Proceed, Mr. Waters.

A. The effect would be demoralizing from the standpoint of realizing to the best advantage, the greatest possible advantage, on the material we now have in stock.

Q. Why would that be so?

A. Because the trade—I refer to the people who use our material as the trade—would not buy what would be then obsolete material, simply because they would realize that they could not secure repair parts. They would have difficulty in selling orphan product. Even though the product would be all right, there would be no assurance that repairs could later be secured, if the occasion arose. I might read a letter from our general manager of sales written in December, December 5th. It has a great deal of bearing on this subject——

[fol. 223] Mr Royall: Just a minute. I object to this testimony. They are not sworn witnesses.

Mr. Teall: If that is objected to, it is not competent.

The Court: The objection is sustained.

Q. Now, as you went ahead, we will suppose, in liquidating the inventory, and you sold ten or fifteen, or twenty, or twenty-five per cent of it, what would be the effect on the rest of it, as to whether you had full lines or not?

Mr. Royall: I object to this same course of hypothetical questioning.

The Court: I will overrule the objection, and note an exception.

Q. Proceed, Mr. Waters.

A. It would mean this, Mr. Teall: The product that you have could not be sold to the best advantage, because you couldn't furnish complete units; and it would mean that the stock that you would have would be reverted to scrap; the only thing you could get for it would be scrap value.

Q. Have you had any personal experience with the liquidation and sale of obsolete radiator equipment?

A. Yes, we have had experience in that direction.

[fol. 224] Q. And you personally know about that, and it came within your personal observation?

A. I do, yes.

Q. In what way did you obtain that experience, and what was the nature of it?

A. After the consolidation in 1927, the Corporation had on hand large quantities of radiation and boilers produced by the predecessor companies. That was all different; each company produced different material. It was necessary that we standardize on one type of radiation. By "one" I mean a type of tube radiation, a type of wall radiation, a type of indirect, and so on. And the same thing on boilers, it was necessary we standardize. In doing that, it was necessary to obsolete the stocks that had been made by these other companies. For instance, at that time we offered—In 1928, we offered the tube radiation produced by Guerney, Continental and Niagara at 22 cents a foot. The average sheet price at that time was 30 cents a foot. While that radiation was standard design, it was obsolete radiation by reason of the fact that the Corporation standardized on the Aero radiator. It took us two and a half years to dispose of the obsolete radiation.

Mr. Royall:

Q. What do you say you standarized on?

A. Aero—A-e-r-o. That is a trade name; that is the kind that the Corporation is making now.

Q. That is your trade name, is it not—for your stuff?

A. Yes. It took us two and a half years to dispose of the [fol. 225] radiation, and we were not liquidating the company; it was just simply getting rid of it, and the purchaser knew they could get—had reason to believe they could get repairs when necessary. But to do that it took us two and a half years, and it finally sold at 12½ cents a foot.

Mr. Teall:

Q. As against a normal price of what?

A. 30 cents a foot.

Q. Did you have any expense in connection with getting that 12½ cents a foot?

A. Yes, we had. It was handled by our regular selling organization; and in 1928, selling expense, or cost of selling, including advertising, was $1,038,000.

Q. Now, you have some accounts receivable on your books. I suppose you are familiar with the customers, Mr.

Waters, who they are and what kind of business they are in?

A. Yes, I am.

Q. To whom do you generally sell?

A. We sell the majority of our product—the majority of our product goes to "the trade," as we call it, the steam fitter. We have probably 1,500 accounts of that type. The jobbers—there are about 500 jobber accounts, and perhaps 100 consumer accounts.

Q. In your opinion, Mr. Waters, from your experience as a receiver and an officer of this company, and connected with the radiator business for some time—in your opinion, if your company should cease operation and liquidate, would that have any effect upon the collectibility of your [fol. 226] accounts receivable?—Wait just a minute. I think Mr. Royall wants to object.

Mr. Royall: I object, on the ground that this is hypothetical and calls for a conclusion, and speculative; and he is not qualified as an expert to answer; and it is speculative, even if he were an expert.

The Court: Well, probably the Court knows as much about that as he does.

Mr. Teall: Of course, this sort of examination—I understood my friend to suggest the advisability of complete liquidation and going out of business, and turning everything into money, and I am just trying to show what the prospects would be.

The Court: I will overrule the objection and note an exception.

Q. (Question read.)

A. I should think it would cost——

Q. Now, just a minute. Have you had any experience with that kind of thing?

A. No.

Q. Well, what about the situation up at Canada, since you have been receiver?

A. Well there the Canadian situation is this: We are going to liquidate the Canadian branch. It has not as yet been completed, but we have reason to believe that there will be a substantial loss incurred. As I say, I have not [fol. 227] had any actual experience, because it is merely in the process of being liquidated now.

Q. Well, you have been trying for some period of time to collect back accounts receivable, have you not?

A. Yes, we have.

Q. And with what success?

A. Well, it has not been very successful.

Q. You have not collected? And how long have you been at it?

A. Since November, the latter part of November, or the first of November.

Q. Mr. Waters, I am going to put a question to you presently on upset price, and so that you will have in mind what I mean by "upset price" when I put that question to you, I am reading from the opinion of the Court in Guaranty Trust Company against Chicago, Milwaukee & St. Paul Railway Company, 15 Federal (2d), 434, at page 442. Here is what the Court says on upset price: "What the Court is doing in naming an upset price is merely to draw a line below which it will refuse to consider bids. It is discretionary with the Court, but quite common, to fix an upset price." Taking the phrase "upset price" in that sense, it fixes a line below which the Court will refuse to consider bids. Do you have in mind a figure that you would consider proper for the upset price of the property of this corporation? Just state whether or not you have the figure in mind?

A. Yes, I have.

Q. What is it?

[fol. 228] Mr. Royall: Object. Now, your Honor, this is objectionable for so many reasons that I want to put them on the record. In the first place, what Judge Wilkerson said in the Chicago, Milwaukee & St. Paul receivership has no relationship, no possible relationship, to the situation that we have here——

The Court: May I interrupt you about that? There is no question about that phase of it. That interpretation, it would seem to me, would not be any real part of the objection here. But the objectionable part, it seems to me, is largely that that has been made up by the Court from all the four corners of the testimony.

Mr. Teall: I appreciate that. I have various witnesses to express figures for your Honor's consideration. Of

course they are not binding on the Court, they are just to give your Honor such assistance as is possible.

The Court: Well, it is, rather, to get the whole situation before the Court, and then it is an argument of counsel, perhaps, and then it is for the Court to make the decision. I don't know whether it would be of value to have a witness state that, because the Court will see whether his mind and the witness's will jump in common at all.

[fol. 229] Mr. Teall: It is my purpose to follow this with the further question, asking the witness to explain how he arrives at the figures he is expressing, what is the basis of his opinion. This matter of upset price, as I understand it, is largely informal; I don't know that the rules of evidence apply to it. It is simply an effort to give the Court such light as can be given, and this witness is the Court's own receiver, to whom the Court would naturally turn for light. Now, of course, it is not a valuation proceeding, it is simply to give the Court such light as we can, that is all.

Mr. Royall: I press my objection, your Honor.

The Court: Stepping aside for the minute—There are a good many elements would have to come in, and it would be for the Court to determine largely what those elements would be. Frankly, I don't think the opinion of a witness, particularly of a lay witness, not specially acquainted with the administration of estates in receivership, and the various questions that would be considered by the Court, would be of very much value to us.

Mr. Teall: Now, I appreciate that the Court is going to ask counsel—probably the counsel for all parties concerned, what their views are on this, and I assure your Honor——

[fol. 230] The Court: Well, of course, incidentally, I want to know what the amount of the general indebtedness is, as opposed to the secured——

Mr. Royall: There is no secured, your Honor.

The Court: I want to know whether the expenses will be sufficient to take care of the expenses of the administration, and I of course would like to know the amount all the disgruntled bondholders hold, among other things. And from those elements, and some others, I would have to make up my mind as to the upset price.

Mr. Teall: Of course, it isn't expected your Honor is bound by these witnesses' opinion.

The Court: Well, I would be bound to this extent—that is, we have testimony as to an amount which would fairly cover the expenses of administration, which would have to be paid; we will have to take care of those out of an upset price in cash, of course.

Mr. Teall: The decree as now drawn—and of course that is just drawn for your Honor's consideration—is drawn on the theory that the purchaser will assume all the obligations incurred as to the receivership; in other words, that the [fol. 231] property would be sold subject to all the receivership obligations, which the purchaser would have to take care of. I understand from my associate, Mr. Bennett, who has been through a great many of these receiverships, relating to industrial concerns and a great variety of others, that that is, if not the usual form of decree, at least a very common one.

The Court: I would be rather afraid of an indefinite decree of that kind, where the purchaser was to some extent buying "a pig in a poke." Of course, if he had a prior arrangement as to what the obligations would be, all right, if the purchaser assumes them.

Mr. Teall: Your Honor might suggest the decree to be in some different form from that. That is a matter for further discussion, no doubt. What I want to do with this witness is simply to give your Honor his idea—and he is the Court's receiver—what he thinks the upset price ought to be here. Now, we can have just as many and different opinions——

The Court: Go ahead for what it is worth.

Mr. Royall: My objection is noted, your Honor, and I press it very seriously.

The Court: I note you an exception.

[fol. 232] Mr. Royall: I think this is very highly objectionable, your Honor.

The Court: I don't see any other way of getting at it.

Q. What is your figure, Mr. Waters?

A. If I am permitted to do so, I will build up the figure so as to arrive at the total, by starting in with the detail.

Q. Well, suppose you give us your total first, and then give us the detail.

A. I arrive at the total of $2,195,695, arrived at in this manner: Cash, United States certificates of deposit, bank

certificates of deposit, accrued interest thereon, cash surrender value of life insurance, amount to around $1,830,000; the inventory—these figures are as of the first of the year, or as of December 31—amounts to $1,634,905. Based on our knowledge of the depreciation in value of product previously obsoleted, and taking into consideration depreciated value of radiation obsoleted by the Kewanee Radiator Company in 1931, I don't believe that our inventories would net us more than around $327,000.

Mr. Royall:

Q. $327,000 as against what?

A. $1,674,000—using the experience of the company in 1928, that is, the National Radiator Company, which closely follows the experience of the Kewanee Radiator Company, which was obsoleted in '31.

Mr. Teall:

Q. I believe you said your sales expense was—how much?

[fol. 233] A. The sales expense last year was seven hundred and some odd thousand dollars. And assuming that there would be a reduction in notes and accounts receivable, based on what we anticipate may result in Canada, the $858,000 of notes and accounts receivable would be depreciated to around $172,000. As far as the plants are concerned, the real estate, they would undoubtedly have to go at what you might call panic prices, because the industry is vastly overplanted today. It is inconceivable to me, as an operating man, and having been in the industry for some time, that our competitors, or anyone with capital to invest, is going to go out and buy radiator plants at this time. I think we would be fortunate if we got a half million dollars for the plant. We have sold some equipment since the receivership, a small amount. We endeavored to sell equipment prior to the receivership, surplus equipment, that, although used by other companies, like motor generators, turbine compressors, and things of that kind, are almost a drug on the market. So that is my opinion regarding the probable realization on the plants at this time. Those items total $2,195,000.

Mr. Royall:

Q. Did you reduce your cash? Did you take some deduction off that—did you say that?

A. Yes, I have taken out of that the cost of selling.

Q. Did you allow us a hundred per cent for cash?

A. It amounted to $625,000 for the first year—yes.

Q. I didn't hear that.

[fol. 234] A. I say your cost of selling the properties will absorb—will take up the cash.

Q. Oh, I see. Well, I want to see how you got this total. Against the $1,800,000 in cash, you write down in the right hand column how much to make up your total?

A. $171,000 in notes and accounts receivable, around $327,000 in inventory.

Q. Yes, and $500,000 in the plants?

A. And then——

Q. What did you say about the cash? That is what I want to know?

A. That is included in there.

Q. At what figure?

A. $1,831,000.

Q. $1,831,000 added to that makes it, doesn't it? It doesn't jibe with the $2,100,000?

A. Then I deducted from that $2,605,000 as the cost of selling.

Q. Oh, I see. Before you deducted that, did you total the four other items?

A. Pardon me?

Q. Did you total on your memorandum the four other items?

A. Yes.

Q. What was the total of the four items?

A. I have got a total of cash, notes and accounts receivable, and inventories of $2,330,000.

Q. Well, that $500,000 added to that?

A. And less the cost of selling the inventories, $635,000, plus $500,000.

[fol. 235] Q. I see you have done it that way, $500,000 on the end. Well, we will work that out later on.

A. Those are merely approximate figures.

Mr. Teall:

Q. You have answered my question, I take it, on the theory of what you think could be done in the event of turning everything into cash. Is that right?

A. Yes, sir.

Q. Now, in your opinion, could that turning everything into cash be effectuated in a short time or a long time, or how long would it take?

A. I think it would take probably two years, or two and a half years.

Mr. Royall: I object to this whole course of hypothetical questioning.

The Court: We will admit it. Note an exception.

Q. Mr. Waters, how does your present production compare as to quantity with your production in '31 and in '30 and in '29?

A. In '31 we produced 7,610,000 feet of radiation; in 1930 we produced 9,536,000 feet; in 1929, 15,824,000 feet. On boilers——

Mr. Royall: Will you go back to 1928. Would you mind having him go back to 1928?

Q. All right. Have you got the figure for '28?

A. In '28 we produced 22,809,000 feet of radiation; in '27 the predecessor companies, that came into the consolidation, produced 37,037,947 feet of radiation.

[fol. 236] Q. I think that is far enough back.

A. In boilers, in '31 we produced 30,108,000 pounds; in 1930, 22,974,000 pounds; in '29, 30,540,000; in '28, 28,541,000, and in '27, 56,565,000. And I have here the relation to the industry's production, and the relation of the two, if desired.

Cross-examination.

Mr. Royall:

Q. Now, which was the first plant that you shut down after the merger—Before I get into that, just some formal questions for the purpose of the record, before we get into this valuation. You have testified that you are the vice president of the defendant corporation?

A. I did.

Q. Will you please state on the record who the other officers are?

A. At which time?

Q. At the time of the receivership and at the present time?

A. At the time of the receivership the officers of the corporation were: president and chairman of the board, John W. Waters; chairman of the executive committee, Rudolph B. Flershem; vice president in charge of sales, Charles L. Krause; secretary and treasurer, Carl E. Resley; and vice president, Samuel B. Waters.

Q. Are you Samuel B. Waters?

A. Robert S. Waters.

Q. And you are also vice president?

A. I am, yes.

[fol. 237] Q. Now, you mentioned Mr. John H. Waters, and you mentioned yourself, and you mentioned Mr. Samuel——

A. Samuel B. Waters.

Q. Are you related, all three of you?

A. I am a son of John H. Waters and a nephew of Samuel B. Waters.

Q. Are all of these gentlemen directors whom you have just mentioned as officers?

A. All but Samuel B. Waters.

Q. Are there any other directors than those officers?

A. Yes, sir.

Q. Who are they?

A. The other directors are George O. Suppes, John W. Watson, Harry S. Endsley, Herman E. Baumer, Andrew B. Crichton; John Price Jones is a director also.

Q. Will you please indicate who these gentlemen are, what relationship they have to the company or to other interests?

A. Herman E. Baumer was formerly president of the Union Radiator Company—formerly treasurer of the Union Radiator Company—Andrew B. Crichton is a coal operator and engineer in Johnstown; Harry S. Endsley, Esq., was the counsel for the corporation——

Q. Is the counsel in this proceeding for the corporation?

A. Yes. I am speaking of the time of the Corporation. John Price Jones, publicity man in New York City; George O. Suppes, a banker.

[fol. 238] Q. Where?

A. Johnstown; and John W. Watson, formerly president of the Continental Heater Company.

Q. Now, the Guerney Heater Company, what did it own before it merged with you?

A. It owned a plant in Framingham, Massachusetts.

Q. When did that plant get closed after the merger?

A. That plant was closed in 1929.

Q. Now, you testified to some—what you characterize as efforts to sell that plant, didn't you?

A. I did, yes, sir.

Q. And I think you made some mention of granting an option, a ninety-day option to somebody. Was it on that plant?

A. Yes.

Q. How was the option figured?

A. It was an option on this basis: That Mr. Lewis would have the—we would not endeavor to sell the property during the time that he had it for the purpose of trying to organize a company, or a group of men to take that plant over with the North Tonawanda plant; the terms and the basis of sale to be considered if he received, or was able to interest anybody—if he were able to get anybody interested in taking over those properties.

Q. Was there no indication of the prices that were to be discussed or considered?

A. I don't recall the details of the option.

Q. Well, try to recall them as best you can. Don't you know that?

[fol. 239] A. As I recall, I think the properties were—the two properties were—I think we were trying to get around $400,000 for those properties.

Q. You mean two properties—what two properties?

A. Framingham and North Tonawanda, they were both given to Mr. Lewis.

Q. And what do you include in "properties"—merely plants?

A. Plants.

Q. And nothing else?

A. Equipment.

Q. "Equipment" means what, in your mind?

A. Machinery, patterns, flasks, core equipment, fixed things like cupola——

Q. Well, would it be included in the all-inclusive word of "plant"?

A. Yes.

Q. And are you sure it wasn't more than $400,000 you were negotiating for?

A. I don't think so. I don't think it was.

Q. Now, you say that was in what year you were negotiating for that?

A. That was in 1931, the first part of the year, April.

Q. Did you ever make any effort before 1931 to do anything with it?

A. In 1930 we listed that plant with the Edison Electrical Illuminating Company, as a plant that would be available for sale, without any price.

Q. Did you ever list the property with any real estate agency, giving a price and authorizing them to negotiate on a price basis?

[fol. 240] A. We had an inquiry from Willison, which I mentioned before.

Q. Well, tell us about the inquiry?

A. He wanted to know if we had a plant that was available, that he had some people who were looking for a plant.

Q. What did you tell him?

A. Told him that we did, and he replied——

Q. Did you give him a figure when you told him you did?

A. No, I didn't, as I recall. He just wanted to know if the plant would be available for sale, and I said it would.

Q. That is all there was to that?

A. The people that were interested would talk to me about some kind of stock proposition, or something, a thing which didn't concern us or didn't interest us much at the time.

Q. Well, did you ever visit this plant during all these years it has been idle? When did you say it became idle?

A. It became idle in 1929.

Q. Early in 1929 or late in '29?

A. I think I can give you the exact date. June, 1929.

Q. Since June, 1929, have you ever authorized any real estate agents or realtors—if you care to choose that word—to act for the corporation in selling this Framingham plant?

A. Nothing more than it was turned over to this—our discussions with Mr. Willison.

Q. Well, Mr. Willison asked you if you had a plant and [fol. 241] you said yes, and that is all there was to that?

A. That is all.

Q. Have you ever made any advertisement of the fact that the property was for sale?

A. No.

Q. Did you ever make any efforts whatsoever, excepting the efforts you have just testified to, to bring about a sale of the property?

A. Only those I have testified to.

Q. Now then, what is that property carried for on the books of the corporation?

A. I don't have the detail figures here. I can get them for you.

Mr. Teall: That is all in the receivers' report that is filed.

Q. Is it not a fact that this property was carried upon the books of the corporation, as of the date of the receivership, at $592,452.64?

A. I can't state definitely that it is. I don't have the records here. (Report handed to witness.) $592,452.64.

Q. Is it not a fact that that figure represents the figure that the plant was set up, charged on the books of the corporation in 1927, discounted down by depreciations charged against the property from 1927 to the date of the receivership?

A. Less whatever equipment was removed from there. We removed some of the equipment to other plants.

Q. With that exception, your answer is yes?

[fol. 242] A. I would say so, yes.

Q. Now then, the valuation that got set up on your books in 1927 for that plant, what was that based on?

A. That was based on an appraisal made by a company that was engaged by the Bankers Trust Company, to form the consolidation.

Q. And the name of that appraisal company was Sanderson & Porter, wasn't it?

A. I believe so, yes.

Q. Do you know anythinng about them?

A. I don't know.

Q. Never heard of them before?

A. I heard of them at that time, yes.

Q. But you don't know whether they are competent or incompetent engineers?

A. I presume they are competent because of the fact that they were engaged by a firm as reputable as the Bankers Trust Company.

Q. At any rate, the figure of $592,452.64 represents Sanderson & Porter's appraisal of 1927, less discounts and less property that may have been removed. Is that right?

A. If you say so, yes.

Q. Now, tell us how much has been removed?

A. The equipment for producing boilers and radiation, part of it was scrapped; some of the obsolete boring machines were sold, were scrapped also; some of the small equipment was dispensed with, being of no further use——

Q. How much, without going into detail? I don't care for the detail, unless you wish to give it. Tell me how much in dollars and cents.

[fol. 243] A. I don't have those detail records with me.

Q. Well, make a rough guess then.

A. I would rather not guess.

Q. You have been doing some guessing today——

A. Only on opinions.

Q. Well, I ask you to give an opinion.

A. This is fact, and can be substantiated.

Q. Well, we won't call it guess. Will you please give me your opinion?

A. I said that I couldn't give you an opinion, because I don't know.

Q. You are the manager of the company, aren't you?

A. Well, I don't pretend to keep all figures in my head, no.

Q. Well, was it the bulk of their equipment that was removed or was it less than the bulk of their equipment.

A. Well, I would say it was about a third of their equipment.

Q. A third of their equipment. Have you any reason to disparage or to doubt the accuracy of the appraisal that was made of this plant in 1927, at which you set it up on the books?

A. I didn't set it up on the books.

Q. At which your company set it up on the books?

A. I have no reason to doubt it, no. It was values that existed at that time.

Q. You feel that the values that existed at that time were a fair appraisal?

A. It was amply fair, yes.

Q. You mean by "amply fair" that it did not exaggerate or overstate?

[fol. 244] A. I think it was a liberal appraisement for the selling company—put it that way.

Q. You suggest that in establishing values for the sale of the bonds, that a different appraisal ought to be—*that a different appraisal ought to be*—that a different viewpoint of appraisal has been taken here than you would take, for this purpose?

A. At that time, you mean?

Q. Yes, at that time, as of that time.

A. I think this: that the values that existed then and exist now are entirely different.

Q. I am not questioning that; times have changed.

A. Very materially.

Q. And you misunderstood my question. (Question read.) I am confining that to a fair appraisal in 1927, on 1927 values.

A. 1927 values, in the condition of business at that time, it looked reasonably certain that the company, the Guerney plant, could make good on the price of the bonds.

Q. Well, you agree with the appraisal, with this 1927 appraisal?

A. As of that time?

Q. As of that time. I think you can say yes or no to that, whether you agree or disagree with it?

A. Well, I don't agree with it wholly, no.

Q. Well, do you disagree with it?

A. Yes.

Q. Now then, what do you think that should have been valued at in 1927?

A. From what standpoint—an earning standpoint?

[fol. 245] Q. As a business man, familiar with this property, I ask you what you think the property should have been valued at.

Mr. Teall: May I ask you to clarify your question, as to whether you mean market value or replacement value, or what basis of valuation you refer to—whether you mean what a buyer would give for it or what it would cost to build it, or what?

Mr. Royall: I mean fair market value. If we own a house, we all have a fair idea of what its fair market value is—if we own an office building, or own a plant. And I assume that this appraisal, to have been justified, must have been based upon the idea of its fair market value.

Q. Now then, do you agree or disagree with that appraisal? You said you disagreed with it, I believe?

A. Yes, I did.

Q. Now then, what do you think the amount of the appraisal should have been?

A. Well, that is what I would like to know, from what standpoint you are considering it—replacement value or——

Q. Fair market value?

A. I would say at that time, knowing the plant as I do, about twenty per cent less.

Q. Now then, you mentioned another business that you bought out. What was that—the Niagara Boiler Company?

A. The Niagara Radiator and Boiler Company.

Q. Where was their plant?

[fol. 246] A. Their plant was in North Tonawanda.

Q. When, if ever, did you cease operating that?

A. Ceased operating that in October, 1927.

Q. Hardly before you got into the saddle you ceased with that—Is that the fact—two months after the organization of the company?

A. That is correct, yes.

Q. What did you do, if anything, in 1927 to sell it?

A. Nothing.

Q. What did you do in 1928 to sell it?

A. Nothing in '28.

Q. What did you do in 1929, if anything, to sell it?

A. We didn't do anything until 1931.

Q. Nothing at all until 1931? And then what did you do to sell it?

A. That was one of the plants that was——

Q. The subject of your testimony in connection with the Framingham deal?

A. Considered by Mr. Lewis.

Q. Optioned to Mr. Lewis, with the Framingham property?

A. Yes.

Q. Anything else done on this Tonawanda property?

A. No. In 1928 we released the property to the Lincoln Niagara Company.

Q. What do they do for a living?

A. Manufacture boilers and radiators—only radiators; they job boilers.

Q. Now, is it not a fact that at the time of the receiver-

[fol. 247] ship this North Tonawanda property, North

Tonawanda plant, was carried on your books at $626,383.95?

A. If that is the figure that is in here (indicating report), yes.

Q. Well, I am not asking you if that is the figure that is in there. I am asking you if that is what it was carried on the books at.

A. $626,383.95.

Q. Now then, is it true of this plant, that that valuation of $626,383.95 reflects an appraisal made in 1927, also by Sanderson & Porter, less depreciation charged against it from 1927 to date of receivership?

A. Yes.

Q. Do you agree in this instance, or disagree, with the valuation of Sanderson & Porter?

A. My opinion is that it was high by about the same percentage as Framingham.

Q. Mr. Sanderson and Mr. Porter would like to hear you disparage their appraisals.

A. That is merely my opinion, which you asked for.

Q. What was the method of depreciating the property? What depreciation rates did you use during the year 1927, in the receivership, in working out the depreciations? I will confine this question for the moment to the North Tonawanda property.

A. Buildings were depreciated at 2½ per cent a year; flasks and patterns and molding machinery 15 per cent; and machinery and other equipment, as I recall it, 8 per cent.

Q. Per year?

[fol. 248] A. Yes.

Q. So that against your buildings you had written down 12½ per cent from the Sanderson & Porter appraisal to the receivership. Is that not a fact?

A. That is right.

Q. And as to your equipment you had written down—in respect to some of the equipment as much as 75 per cent, and in respect of some of the other equipment—What did you say you depreciated the rest?

A. About 30 per cent—8 per cent on one class and 15 on the other.

Q. About 30 per cent for that. Is that right?

A. That is correct.

Q. So that the appraisals of Sanderson & Porter were as to land unchanged?

A. Unchanged.

Q. As to buildings a net writedown of 12 or 13 per cent; as to certain kinds of equipment a writedown of 75 per cent approximately, and as to certain other equipment a write-down of 30 per cent. Is that right?

A. Yes, sir.

Q. Now, I ask you if what we have just said applies equally to the Framingham property, as to depreciation?

A. Yes, it does. The same rate was used at all plants.

Q. Perhaps we will save time in dealing with the other ones that I am going to ask you about, if you will make the same statement now, if you care to do so, that that method of depreciation was applied to all plants during the period in question?

A. It was, yes.

[fol. 249] Q. Now then, you have testified something here about—Was that Continental Heater Company?

A. Yes, at Dunkirk.

Q. That was another one of the constituents you took in?

A. Yes, it was.

Q. And their plant, you say, was at Dunkirk?

A. Yes.

Q. Now, did the time ever come when that got closed down?

A. Yes, operations were suspended there in the boiler plant in February, 1930, and radiation in March, 1930.

Q. Since early 1930. After February or March, 1930, did you do anything to sell it, during 1930?

A. Merely listed it with the Industrial Department of the New York Central.

Q. Did you put a figure on it?

A. No.

Q. Did you advertise it?

A. No.

Q. Did you list it with any agent?

A. No.

Q. You did nothing whatsoever except to write a letter to the Industrial Department of the New York Central, and say the property was available for purchase, if somebody wanted to buy it?

A. Yes. It was, however, included in our discussions with the Appel Company in Cleveland in 1930.

Q. Now then, what was that carried at on your books at the time of the receivership?—We are at Dunkirk now, aren't we?

[fol. 250] A. Yes.

Q. $691,989.55?

A. That is correct.

Q. And was that figure arrived at in the same way?

A. Yes, sir.

Q. That is, was it the subject of the appraisal of Sanderson & Porter at a considerably higher figure in 1927, depreciated down to that figure in the manner you have testified in respect to the others?

A. Yes.

Q. Now then, you have testified to another one—Utica Heater?

A. Yes.

Q. That was one of the constituents that the merger took in. Is that correct?

A. That is correct.

Q. Where is their plant?

A. Utica, New York.

Q. What did you do with it?

A. We sold that plant.

Q. Oh. When did you sell that?

A. In December, 1927, I believe.

Q. Sold it almost as soon as you got it?

A. Yes.

Q. And what were the circumstances of that sale?

A. That plant was sold to the Richardson & Boynton Company; it was a boiler plant and heater plant. They manufacture boilers and heaters.

Q. How much did you get for it?

A. Around $700,000.

Q. Cash?

[fol. 251] A. Cash and notes.

Q. That was included in Sanderson & Porter's appraisal, was it not?

A. Yes.

Q. Tell me what Sanderson & Porter appraised it for?

A. May I have a copy of the appraisal?—The fixed assets of Utica Heater Company as of December 31, 1926, amounted to $690,000.

Q. And that is the same property that you sold for $700,000?

A. $733,000, I think. The furnace business went with that. The equipment for producing boilers was held out, that equipment being moved to New Castle.

Q. So that you sold less than all?

A. Less the equipment for producing sectional boilers

Q. Anyway, you sold that plant less some of it?

A. Yes.

Q. To Richardson & Boynton, for $733,000?

A. I think it was $733,000—over $700,000.

Q. And Sanderson & Porter appraised it, the whole of it, for $690,000. Is that right?

A. That is right.

Q. Now, does that lead you at all to revise your thoughts expressed on the stand here as to the soundness of Sanderson & Porter's appraisal?

A. I think it was all right in this case, and I think their appraisal was all right in the case of the Continental.

(Adjourned until Friday, March 4, 1932, at ten o'clock A. M.)

[fol. 252] Friday, March 4, 1932.

Morning Session

ROBERT S. WATERS RESUMED

ROBERT S. WATERS resumes the stand.

Cross-examination (continued).

Mr. Royall:

Q. Mr. Waters, the property the acquisition of which you next mentioned upon your direct examination was that of the Union Radiator Company. Will you please tell us what properties there came in with it—in 1927?

A. The plant at Johnstown, Pennsylvania, consisting of foundry core room, cleaning room, testing room, assembling, loading, storage, as well as machine shop for manufacturing equipment.

Q. Equipped for manufacturing boilers and radiators?
A. No, merely radiators.
Q. That concern was engaged in the business of manufacturing merely radiators, was it?
A. Yes.
Q. Then may I ask you as to these previously testified to acquisitions? The first was—What was that, Guerney Heater?
A. Guerney, yes.
Q. Were they equipped merely for radiators, or for boilers, or for both?
A. Both.
Q. The next one, the Niagara, did it have radiators or boilers, or both?
[fol. 253] A. At the North Tonawanda plant, yes; at Chicago, equipped for the manufacture of radiation.
Q. Now, I think, when you were speaking of that, perhaps we had in mind only North Tonawanda. Am I wrong? Did you testify on your direct examination as to the valuation of the Chicago plant?
A. Yes.
Q. Then I think we had better go back to that. Now, the Chicago plant and the Tonawanda plant came in through the acquisition of this Niagara property?
A. That is right.
Q. And you have testified as to the valuations upon this Tonawanda plant?
A. Yes.
Q. Now, please tell us about this Chicago plant? Was that also the subject of a separate appraisal of Sanderson & Porter in 1927?
A. I believe so, yes.
Q. And will you tell me how much they appraised it for?
A. The Sanderson & Porter appraisal for the Niagara Radiator & Boiler Company shows the Chicago plant appraised at $564,284.
Q. What did that include?
A. It included land and buildings, machinery and equipment, less the depreciation on buildings and machinery, and also included flasks, patterns——
Q. Well, that wasn't less depreciation, was it? That was a new appraisal, a new appraisal made as of that

date? Depreciation has been applied to that appraisal since that date? Isn't that the way it has been done?

[fol. 254] A. No; the appraisal was as of December 31, 1926, and then brought up to 1927.

Q. Oh, I see. Tell us what the appraisal was as of December 1, 1926—All of these appraisals you have testified to were the original Sanderson-Porter appraisals, weren't they?

A. They were—as of that date, December 31.

Q. Yes—you say that was the date as to which it was?

A. Yes.

Q. Well, what was the amount as of that date?

A. Of the Chicago plant?

Q. Quite so.

A. $564,284.

Q. Now, isn't there also a property in Chicago which you speak of in your inventory here as a warehouse?

A. Yes, but not under Niagara Radiator and Boiler Company.

Q. Oh, I see. That came in in some other way. So that, as to that Chicago warehouse, this appraisal was not inclusive of that?

A. No, not under the Niagara, no.

Q. Well, the appraisal we are talking about did not include that? The figure you have given did not include that?

A. It did not include that, no.

Q. Now, as of the date of the receivership, the Chicago plant was carried at $605,000. Is that right? $605,149.43?

A. I will have to verify that—$605,149.43.

Q. So that there have been additional acquisitions, and [fol. 255] expenditures, improvements, developments of that Chicago plant since 1927?

A. Yes, there have been additions made there in the nature of equipment.

Q. The figure of $605,149.43, which you carried it at at the date of the receivership, was arrived at in the following manner, was it not: By depreciating the buildings and equipment, starting with the basis of the Sanderson & Porter appraisal, in the manner you have testified, 2½ as to buildings—2½ annually as to buildings, 6 per cent annually as to certain of the equipment, and 15 per cent annually as to certain other equipment, and by adding onto

it the cost of the improvements and additions, and depreciating those in turn from the time of those additional investments in the plant. Is that right?

A. That is correct.

Q. And depreciating those in turn by the same method of depreciation generally used?

A. Yes, sir. Included in this figure of $605,000, however, is the Chicago warehouse, which is not included in the $564,284.

Q. I see. Now, how did the Chicago warehouse get into the defendant corporation?

A. That was part of the National Radiator Company's property at the time of the consolidation.

Q. And that also was appraised—that Chicago warehouse—by Sanderson & Porter?

A. Yes, sir.

Q. As of this basic 1927 date, at $66,149.11?

A. The National Radiator Company's Chicago warehouse is shown in the Sanderson-Porter appraisal at $73,646.

[fol. 256] Q. Well, the inventory which you have filed contains this: "Chicago Warehouse, Chicago, Ill. (Warehouse one-story brick construction) $66,149.11, less depreciation to October 8, 1931, $4,117.59"—line, subtraction shown $2,031.52?

A. Correct.

Q. I thought you said your method was to set the property up when the corporation was set up, in conformity with the Sanderson-Porter appraisals, and then depreciate it down by this depreciation method to the date of the receivership. Can you explain why this figure $66,149.11 is used in this instance rather than the figure of seventy thousand odd, which you testified to as the figure on the Sanderson & Porter appraisal?

A. The difference is undoubtedly accounted for by depreciation between the date of the Sanderson-Porter appraisal and the date of the receivers' inventory.

Q. But if you will look again you will see that the basic figure before the depreciation is $66,149.11, and not the figure—What is the Sanderson-Porter?

A. Sanderson-Porter is $73,646.

Q. —and not the figure of $73,646, which was the appraisal figure of Sanderson & Porter?

A. No; this $66,149.11 shown in our report here, that is, the receivers' report, is the building and the Chicago warehouse land, as shown by the receivers' appraisal at $30,060.59.

Q. Oh—so the Sanderson-Porter appraisal of seventy odd thousand dollars was just for the building?

[fol. 257] A. We carried it, as shown in here, under warehouse, as $73,646. That is the total figure.

Q. For land and buildings?

A. There is nothing on here showing buildings at all.

Q. You think that is for land, then?

A. It is so indicated, yes.

Q. Let me call this to your attention, then: I do find, as you have pointed out, on your inventory here this additional item, "Chicago warehouse (containing approximately 35,000 square feet, situated at North Keeler avenue in the City of Chicago) $30,060.59," in addition to the item on the appraisal of the building, which item I read into the record a moment ago. So that the sum total at which you carried the land and the building of this warehouse property was the sum of $30,060.59 plus $62,031.52, as of the date of the receivership. Is that right?

A. That is correct, yes.

Q. Well, now, what do you say the appraisal of Sanderson & Porter of the whole thing, land and building, was?

A. It is merely shown on that report which I have before me, as Chicago, Ill., $73,646.

Q. Can you explain that discrepancy?

A. No, I cannot; I cannot explain it.

Q. Now then, nothing else came into the merger through this Niagara, except the Tonawanda plant and the Chicago plant?

A. That is correct.

Q. And you carried the Chicago plant, including the Chicago warehouse, as at the date of the receivership, at a [fol. 258] total of $605,149.43 after depreciation, just testified?

A. That is correct.

Q. Now then, the next of the merged companies that you testified to was, I think, the Union Radiator Company—No, we were on the Union Radiator Company when you had to go back, weren't we? Let us go back to the Union Radiator Company now. Will you tell us at what figure that is carried in your inventory filed herein?

A. We show here in the receivers' appraisal for the Union plant at Johnstown, less depreciation, as of October 8th, $204,378.01 for the buildings; the machinery and equipment at the Union plant at Johnstown as of October 8th is shown in our appraisal as $291,171.02. Then we show patterns and flasks at the Union plant at Johnstown less depreciation, on October 8, 1931, as $89,092.94.

Q. Have you got the aggregate of those three items before you, so that we could put it on the record? If you have to stop to compute the aggregate, I won't take the time of the Court. If you have it, I would like to have it, but I won't ask you to figure it now. Those figures were arrived at in the same method with respect to depreciation as the other plants?

A. Yes.

Q. Starting with the basis of the 1927 Sanderson-Porter appraisal?

A. Yes.

Q. Now, did the Union Company bring anything else into the merger excepting this Johnstown plant which you have described?

[fol. 259] A. The plant and equipment.

Q. Plant and equipment—I used "plant" in that general, broad sense. No other pieces of real estate or other properties?

A. No.

Q. Now, we come to the National Radiator Company. That was the name of a corporation which was conducted at Johnstown prior to 1927?

A. That is correct, yes.

Q. And its property also came into the present defendant corporation, which is known as the National Radiator Corporation?

A. Correct.

Q. Now, what did it, the National Radiator Company, bring into the picture in 1927, what properties?

A. It brought in the following plants: At Johnstown, Pennsylvania; Trenton, New Jersey; New Castle, Pennsylvania; and the warehouse at Chicago; one in Baltimore, Maryland; one in Cincinnati, Ohio; one in Washington, D. C.; and one in Richmond, Virginia.

Q. Is that all the warehouses?

A. That is the warehouses that the company owned.

Q. I mean, does that list of warehouses just given include all the warehouses now belonging to the defendant corporation?

A. Will you repeat that, please?

Q. (Question repeated.)

A. Oh, no; we also had one other property in Garden City, Long Island.

Q. How did that come into it?

[fol. 260] A. The National Radiator Company.

Q. Then all the warehouses that the National Radiator Corporation now has came into it with the National Radiator Company property at the time of the merger. Is that right?

A. That is correct, except those that are leased.

Q. All that you own?

A. All that we own.

Q. You got in that manner?

A. That is right.

Q. And in no other manner?

A. That is right.

Q. Now, then, did you get anything else with the National Radiator Company, excepting the Johnstown plant, the several warehouses—Did you get anything else besides that?

A. We got an office building and property in Johnstown, and residence properties in Johnstown, and residence properties in Trenton, New Jersey.

Q. Before we go into the details of the property acquired with the acquisition of the National Radiator Company, I wish to go back and call your attention to the Dunkirk plant, which I understand was acquired through the acquisition of the Continental Heater Company property?

A. That is correct.

Q. Was anything else acquired through the acquisition of the Continental Heater than the Dunkirk plant?

A. Not any plants.

Q. I am speaking of plants, in the way of plants.

A. No.

[fol. 261] Q. Now, will you describe the Dunkirk property?

A. The Dunkirk property consisted of two plants, one a boiler plant and the other a radiator plant, with a common raw material yard between spanned by overhead cranes.

The boiler plant was capable of producing cast iron boilers, the radiator plant was used for producing cast iron radiation; the equipment and machinery being very similar to that found in the other plants which were described in greater detail.

Q. Now, will you please state on the record at what value this Dunkirk property was carried as at the date of receivership?

A. The Dunkirk plant was carried at the time of the receivership, $691,989.65.

Q. And that figure was arrived at by starting with the base in 1927 of the Sanderson-Porter appraisal and depreciating it down in the manner testified in respect to the other properties?

A. That is right.

Q. Now, when was this Dunkirk plant closed?

A. The Dunkirk plant was closed in 1930—spring of 1930.

Q. Did you make any attempt in 1930 to sell it?

A. Only as described yesterday, through listing it with the New York Central Railroad Industrial Department.

Q. You said that yesterday in respect to the Tonawanda property, perhaps?

A. No, Dunkirk.

Q. I thought you and I agreed you hadn't testified about Dunkirk——

[fol. 262] A. I said that on direct examination.

Q. Well, excepting for that, you have done nothing?

A. Not from the standpoint of selling, no. We have endeavored to lease it.

Q. Didn't you tell us on direct examination, with respect to some one of these plants, that there was a proposition at one time to sell it to some electrical company, or some such company?

A. No; that was the Framingham plant. It was listed with the company as an available plant.

Q. No, but wasn't there something aside from that, about negotiations to sell either this Tonawanda or this Dunkirk plant, for the purpose of some other business, to be used for some other business?

A. That was leasing it for the production of alloy steel, electrical alloy steel.

Q. The proposal was to lease it for that purpose?

A. Or sell it, if we could. The inquiry came about by way of a lease, suggested.

Q. Well, considering agreeable price arrangements, was that at all a feasible thing to do, have it used for such an industrial enterprise?

A. A very small part of the plant would have been, yes. They could not have utilized the entire plant.

Q. In what sense could they use the plant? You mean for the purpose of a foundry?

A. No, it would have been for this purpose: for the manufacture of electric steel in electrical furnaces, which would require a very small part of the foundry building.

[fol. 263] Q. Well, that would depend on how extensive the operations were? If it was an extensive operation, they would use all of it, wouldn't they? And if it was a small thing, they would use part? Wouldn't that be it?

A. Yes.

Q. But it is feasible, is it not, to adapt the Dunkirk plant to uses other than for the manufacture of cast iron radiators or cast iron boilers?

A. It apparently was not felt to be suitable in the eyes of the party who had inquired, after examining the plant. That was the original inquiry.

Q. You told me a moment ago that, the price arrangement being agreeable, the plant was adaptable for these other purposes, but you qualify that by saying that would be for a small operation?

A. Yes—just the same as this room. You could make electric steel in this room.

Q. Well, you don't suggest to the Court that the Dunkirk plant is available for that purpose only in the sense that this room would be available?

A. No, but I mean it could be done in a very small part of it.

Q. Now, will you go back again to National Radiator Company, the old company? That company was an enterprise of the Waters family—I suppose you can describe it as that?

A. Control was in the Waters family, yes.

Q. And the chief officers were members of the Waters family?

A. Yes.

Q. And it was an old family enterprise?

[fol. 264] A. Yes.

Q. Was it a successful enterprise before 1927?

A. We thought so.

Q. Did it make money?

A. Yes.

Q. Did it make a lot of money? Tell us about what the average profits of that concern were up to 1927?

A. I would say for three or four years prior to 1927 the net earnings were around a million and a quarter dollars.

Q. Were there any occasions that you remember, anywhere near 1927, when any stockholders died, and their stock was made the subject matter of inheritance tax appraisals?

A. Stockholders of the old company?

Q. Of the National Radiator Company—who may have died on or before 1927, or within a few years?

A. Not that I recollect.

Q. Well, will you think that over and see whether you can answer whether there were or were not?

Mr. Teall: He says he doesn't recall.

Q. Well, will you think it over, and consult some of your associates here, so that you can refresh your recollection, so that we can ask you about that again?

The Court: If you know any, you can suggest it to him.

Mr. Royall: I don't know any. I want to find out if there were any.

[fol. 265] The Court: Oh.

Mr. Royall: I feel, your Honor, that this witness is an officer of the Court, he is a receiver here, and that he is here in the performance of his duties to protect the interest of the creditors, one of whom I represent, and that he should be of assistance to the creditors——

The Court: Certainly. Don't misunderstand me. I am not attempting to throw anything in your path. That was a mere suggestion in the interest of time.

Mr. Royall: I don't know, your Honor. I just wanted to find out.

Q. Now, will you tell us what these properties were carried at at the date of the receivership—not as a whole, but item by item? First, the plant, then the office building, then

each of the dwellings, then each of the warehouses? To save time, your Honor—that is rather an elaborate thing. I think, if the other side agrees to do so, the receiver may prepare a memorandum to be filed with the reporter, and consider that with his answer.

The Court: I think it would be much more desirable if it could be done and blocked out in some way, so that we could have it, rather than to have to go over it.

[fol. 266] Mr. Royall: I should like it in the record.

Mr. Teall: It is in the record now. He is just called upon to read off some figures that are in the inventory and in the record now.

The Court: That is true, but it would be rather difficult for the Court to get it in that form. I think, if it were separated in this way as counsel desires it, it would be much better, in going over it.

Mr. Royall: My idea was to facilitate it.

Mr. Teall: Now, if you tell me just what it is you want.

Q. Will you prepare for me, Mr. Waters, a list of the properties which came into the merger through National Radiator Company, and separately state the plant, the office building, each separate dwelling, each separate warehouse, with the values set opposite, shown as at the date of the receivership? You will do that?

A. Yes.

Q. And hand it to the reporter?

A. Yes.

Q. And do you say, in respect to that, that such figures were arrived at in the same manner, in respect of depreciation, as was the case with these other properties that you have testified to?

A. Yes.

Q. Now, the Johnstown plant is still operating?

[fol. 267] A. Yes, the Johnstown National plant is.

Q. Yes, the old Johnstown National plant. But the Johnstown Union plant is not operating?

A. When I refer to "operating," I refer to pouring metal. The Union plant is not pouring metal, but the National plant is.

Q. Now, let us go back to the Union plant. The Union plant is not operating in what sense?

A. We are not casting radiators, or any kind of castings, at the Union plant.

Q. Well, the Union plant is primarily for the purpose of casting radiators?

A. Yes.

Q. And not boilers?

A. That is correct.

Q. For what purposes is the plant being used for, if it is not being used for its purpose of casting radiators?

A. It is being used for an assembly plant, or assembling, testing and shipping some radiation. It is also used as an equipment plant, for manufacturing equipment used to produce radiators and boilers and other products produced by the Corporation.

Q. Is that merely a temporary use, or has the plant been converted into a different kind of affair than it was intended originally to be?

A. We are doing this: We are carrying on all our equipment work at one point instead of each of the other plants.

Q. Well, have you converted this thing into a permanent affair for that purpose?

A. Part of it, yes.

[fol. 268] Q. Have you ever made any effort to sell it since the receivership?

A. No.

Q. Is it proposed to put it into operation again, as a plant, for the purposes of casting radiators?

A. If the demand should increase to the point where the capacity of the plant were required, yes; but not until that time.

Q. Now, the plant of the old corporation, the old National corporation, is a plant for the manufacture of both radiators and boilers?

A. No, radiators alone.

Q. Do I understand you, then, that the business of the National Radiator Company prior to 1927, was the business merely of manufacturing radiators?

A. No; radiators and boilers.

Q. Just where were the boilers made?

A. New Castle, Pennsylvania.

Q. What was done at the Trenton plant?

A. Radiation was manufactured there.

Q. And not boilers?

A. No boilers manufactured there.

Q. Now, those were the only three plants that came in through your old company?

A. No, there were three plants, one at Johnstown, one at Trenton, and one at New Castle.

Q. Well, you have testified to all three. Two of them were used only for radiation, and one of them used only for boilers. Is that right?

A. Correct.

Q. Now, some of these competing companies of yours, on the other hand, which you bought out, had plants for nothing but the manufacture of radiators?

[fol. 269] A. I would like to correct that statement. We didn't buy them out.

Q. Well, with which you merged—we will put it that way—or which came into the corporation—we will not characterize it at all—which came into the defendant corporation in 1927. Some of those corporations were merely engaged in the manufacture of radiators. Isn't that true?

A. Union Radiator Company, yes.

Q. Some of them were engaged merely in the manufacture of boilers. Is that a fact?

A. Utica Heater Company.

Q. Utica Heater Company's business was manufacturing boilers. That was their only business?

A. That is correct.

Q. And Framingham made what?

A. They made both.

Q. Union Company's sole business was making radiators?

A. Correct.

Q. Are there any other businesses other than the National Radiator Company, that you know of—or Radiator Corporation—which you know of, operating in the United States, that engage in the business either of solely making boilers or solely making radiators?

A. The International Heater Company makes only boilers and heaters; the Lincoln Niagara Corporation manufactures only radiation; the Utica Radiator Company, at Utica, New York, manufactures radiation; the H. B. Smith Company manufactures boilers alone, they are jobbing radiation now, having it made for them——

[fol. 270] Q. You don't need to give the list of all the radiator companies in the country. Suffice it to say, does it not, that the boiler business is something to be conducted

apart from the radiator business, and the radiator business something to be conducted separate from the boiler business?

A. It is by some companies.

Q. I am not trying to get you to say it is a universal practice, but it is a practice that is common, it is done?

A. Oh, yes, it is done, yes.

Q. Now then, you put these plants on the basis of the Sanderson-Porter appraisals at an aggregate of over $8,000,000 in 1927, for the purpose of setting up the books for your corporation, and for the purpose of representations then made by the corporation and by the banking syndicate also, which acted for it in the issue of the bonds, their value was in excess of $8,000,000. Is that not a fact?

A. I didn't do it, no.

Q. I am asking you if the corporation did not do it?

A. Yes.

Q. You were a director of the corporation?

A. Yes.

Q. And you were vice-president of the corporation?

A. Yes.

Q. You were familiar with the circular—prospectus or circular—for the sale of the bonds, the debentures, at that time?

A. Yes, I saw it.

[fol. 271] Q. You know it was based upon a letter dated August 6, 1927, signed by John H. Waters, as chairman of the board of directors, setting forth that to be a fact?

A. Yes.

Q. That this value was in excess of $8,000,000 for the plants?

Mr. Teall: May I see the letter you refer to?

Mr. Royall: It is the circular, bankers' circular.

Mr. Teall: Where is that?

Mr. Royall: Well, we will get at it this way:

Q. I show you the bankers' circular, just produced here by the attorney for the reorganization committee, dated August 1, 1927, emanating from the Bankers Trust Company and others, as bankers, and I read to you this statement on the page of the circular summarizing the situation of the company as at that date: "Tangible assets after deducting all liabilities except these debentures were approximately $18,000,000."

Mr. Teall: Well, he has explained there that that is on the basis of this Sanderson-Porter appraisal.

Mr. Royall: Quite so. But you can come to your part of the case when I have finished my part of the case.

[fol. 272] Q. Now, will you tell me how that $18,000,000 item was built up—that $18,000,000 tangible assets therein stated was made up?

A. I don't have a copy of the prospectus in my file.

Q. Well, was it not made up in this way: $8,217,359, real estate, machinery, patterns and other equipment, as appraised on December 31, 1926, by Messrs. Sanderson & Porter?

A. That is their appraisal figure, yes.

Q. Plus current assets of $10,742,000?

A. That is correct, as shown here.

Q. And less current liabilities. Is that right?

A. Yes, that is correct here.

Q. Do you regard current assets other than inventory to be tangible assets?

A. Do I regard them to be other than tangible assets?

Q. No; you misunderstood my question. Do you regard assets—Do you regard current assets other than inventory to be tangible assets?

A. Yes.

Q. And it was upon that theory of procedure that you say the statement that the tangible assets were $18,000,000 is justified?

A. As of that date.

Q. Now, you were an officer and director of the corporation at this time?

A. That is dated in 1926.

Q. It is 1927, at that time.

A. Well, that statement is dated as of 1926.

Q. No, that is dated August 1, 1927—was the date of the issue of the circular?

[fol. 273] A. That was the date of the issue of the securities.

Mr. Teall: This figure is as of December 31, 1926.

Mr. Royall: The appraisal was of that date. The circular bears date August 1, 1927.

Q. Were you on August 1, 1927, an officer and director of the National Radiator Corporation?

A. No, I was not.

Q. Were you of the National Radiator Company?

A. I was secretary of the National Radiator Company at that date.

Q. But not a director?

A. Correct.

Q. Did the matter of the issue of these debentures and the acquisition of these properties, and the issuance of this circular, get submitted to the board of directors for approval?

A. Not that I recall, no.

Q. Is it your best recollection that those transactions were carried on by the officers without the approval of the directors?

Mr. Teall: He says he was not a director.

Mr. Royall: He says he was secretary.

The Witness: Of the National Radiator Company, on August 1, 1927. The Corporation didn't come into existence until later.

[fol. 274] Q. Well, this circular was issued, emanated from the National Radiator Corporation, this defendant?

A. I think that was put out by the Bankers Trust Company, not the National Radiator Corporation.

Mr. Teall: It is signed by various banking firms, not by the corporation.

Mr. Royall: Well, if your Honor please, this is done in the customary manner: they always take a letter from the president, as your Honor knows, setting forth the facts, and then they put a letter on the front with a summary, and they say, "This is a letter or summary from the president of the corporation which is attached," and then they go on and say they are not responsible for any of the representations. And here we have as part of the circular signature of John H. Waters as chairman of the board of directors.

Q. Now, you say this defendant corporation was not in existence on August 1, 1927?

A. The consolidation was effected August 30, 1927.

Mr. Teall: This is not the Mr. Waters that signed the letter.

Mr. Royall: This is Mr. Waters that was the secretary of the National Radiator Company, he has testified.

The Witness: As of that date, yes.

[fol. 275] Q. Now then, did you become an officer of the National Radiator Corporation when it became organized?

A. Yes, I was elected director.

Q. You were elected director, and also became secretary of it?

A. No, I was not.

Q. Now, I will ask you whether the matter of this merger and consolidation purchase—call it what you will—putting together of these companies ever became the matter of corporate action of the board of directors either of the old National Radiator Company or of the new National Radiator Corporation, or of either or both of them?

A. The National Radiator Corporation sold out; we had nothing to do with the creation or organization of the new corporation, as a company.

Q. You say they sold out?

A. Yes.

Q. You say the National Radiator Corporation sold out?

A. Company—National Radiator Company—sold its plants, properties and business.

Q. To the National Radiator Corporation?

A. It was taken over by them, yes.

Q. What did the National Radiator Company get paid?

A. I don't recall those figures at this time.

Q. Will you please look that up for us?

A. I can, yes.

Q. Well, you can, can't you?

A. Yes. I see I don't have them right here.

[fol. 276] Q. Will you look them up?

A. Yes.

Q. Now then, do you know of any corporate action of either company underlying the sale and offer of these debentures, and the authorization of the letter of John H. Waters as chairman of the board of directors?

A. Not that I recall.

Q. Will you look it up and see what corporate action there is on your records in that respect?

A. I can do that.

Q. Now, I believe you have testified, in respect of one of two of these properties, that you thought Sanderson-Porter were rather "highish"?

A. I did, yes.

Q. I think, when you got to Utica, you thought they were about all right on Utica?

A. I said they were all right with Continental.

Q. Well, that is the Utica?

A. Oh, no.

Q. Which one was it you sold for $700,000?

A. That was the Utica.

Q. Did you think they were too high on the Utica one?

A. I don't know. The Utica plant was sold early in the history of the corporation. I hadn't a chance to examine and form an opinion of the value of the Utica plant prior to its sale.

Q. Well, would the fact that the corporation, within a year after the date of the appraisal of the Utica plant, was able to sell it for a very substantial amount more than the Sanderson-Porter appraisal persuade you to think that [fol. 277] their appraisal was not too high?

A. That included, in addition to the plant and machinery, the heater business.

Q. Yes, and excluded a lot of stuff too, didn't it?

A. I say, included that, but it excluded some sectional boiler equipment and boring machines, which I think were carried on the books around $20,000.

Q. Now, you have come forward and given your opinion to the Court here upon these questions of valuation, and I ask you whether, in light of what transpired, you think that Sanderson-Porter's appraisal was too high or too low, or about right?

A. I have expressed myself in that way.

Q. You say you can't express yourself.

A. I have.

Q. You think it is too high?

A. No, I couldn't say that about Utica. I wasn't in position——

Q. No, I am not talking about Utica. I asked you to give an opinion now. I didn't ask you before, but now I am asking you for one.

A. I will say this, Mr. Royall. I didn't have an opportunity to examine the Utica plant and observe its layout and methods of operation prior to the sale of the property.

Q. Well, upon direct examination, Mr. Waters——

A. Therefore I am not in position to state whether I think Sanderson-Porter's appraisal was high or whether it was low, but I have so stated my opinion regarding other properties.

Q. Now, you stated in Continental you thought it was about right?

[fol. 278] A. I think Continental was about right.

Q. And you stated a couple of others you thought were rather "highish." As to the appraisal of the Union property, I don't think you have expressed an opinion as to that yet. Do you think that was too high or too low, or about right?

A. I think that was about right.

Q. Now, as to all these properties which came in through your old company, several plants and several warehouses, and office buildings, and dwellings, etcetera, did you think they were about right on those?

A. I thought so.

Q. And you were very familiar with those? That is your old family job, you have known those always?

A. Quite familiar with them.

Q. Now, there was mentioned by you upon your direct examination of something that we have not traced the source of, something called by an Indian name——

A. I can't hear you.

Q. I am sorry. There was something—I didn't know it—some company in Canada, with an Indian name, that you talked about having liquidated, and having bitter experience, on your direct examination—some Canadian company?

A. No, I didn't say anything about any Canadian company.

Q. Well, didn't you tell us on direct examination about liquidating some company, basing your experience on that, the difficulty you had on realizing on accounts receivable, or something?

A. Not a company, no.

Q. Well, what is it you testified to?

[fol. 279] A. I testified to this fact—about the Kewanee Radiator——

Q. Kewanee, that is it. Now, tell us about Kewanee. What is Kewanee?

A. Kewanee Boiler Company is a company that manufactures steel boilers out near Chicago—Kewanee, Illinois.

Q. Has the National Radiator Corporation got any relation to it?

A. No.

Q. But you individually have some relation to it?

A. No, only my experience, knowledge of what happened when they liquidated their radiator stock.

Q. Oh—I gathered you to speak as though that was some enterprise you had conducted?

A. Oh, no, you are mistaken.

Q. But you have some hearsay knowledge that they had some bitter experiences. Is that right? Is that what it comes to?

A. I merely stated what happened when they liquidated, when they sold out their tube radiator stock.

Q. And that is based on what somebody told you?

A. No, it is based on our experience of competing with that stock as it was being liquidated.

Q. Do you know what they got for their stock?

A. I have reason to believe that the information I received is correct, which came from customers to whom we gave bids on our product, and we found out what they were able to buy competitors' product for.

Q. Oh, that is all vague knowledge that you have acquired in such ways as you could?

[fol. 280] A. I wouldn't say it was vague, no.

Q. Well, suffice it to say it was somebody else's affair and not yours?

A. It was vitally our affair, when we were trying to sell in competition——

Q. I mean, Kewanee hasn't anything to do with this picture?

A. Only in so far as establishing values of the product.

Q. It is not one of our constituent companies—or properties? That is what I am getting at?

A. Correct.

Q. Now, you have discussed on your direct the question of interchangeability of product, and I gather you to say that these heating products were in no sense interchange-

able. Is that right? Is that what you intended to convey on your direct examination?

A. I made this statement, or in substance this statement, that you could not use our product in building up competitors' product, in either radiators or boilers.

Q. Is that what you mean by "interchangeable"?

A. You can't use our product in building up or supplementing the product of our competitors.

Q. Just so we understand ourselves perfectly. And although I am a lawyer, from your standpoint I am a layman—I want you to tell us, as an expert, about this radiator business, how it is conducted. As a mere lawyer, and observing what goes on in my own house, I take it that the radiator business, the art of heating buildings by radiators, comes down to something like this: There is a coil located somewhere in the premises, generally in the cellar, for the [fol. 281] purpose of heating water, either steam or hot water, various pipes that connect that boiler with what are known as radiators, which are placed where the radiation or heat is desired; that the boiler and the radiators through these pipes are connected with threaded piping, pipe fittings, couplings, elbows, valves, and whatnot, all of standard interchangeable type; that apertures are found in the boiler for inserting the pipe, which are adaptable for insertion by any kind of a standard threaded fixture; that the same thing is true at the other end, in the radiator; and that the pipe, as fas as that goes—that is what is called steel tubing—that you or your competitors have nothing to do with making the piping, that you buy it from the subsidiary of the U. S. Steel Company, the Youngstown Sheet & Tube Company, or wherever you please, it is a standard, interchangeable article; and the problem then is to put a radiator or boiler in the cellar or some other place, and connect it with these standard, interchangeable pipe and fixtures, with radiators of interchangeable type, situated where you will. Is that a fairly correct or substantial description of the art?

A. That is fairly correct, yes.

Q. Now, you do not mean to suggest that the use of radiators manufactured by your leading competitor, the American Radiator Company, is not perfectly feasible with the use of boilers manufactured by you? You do not mean to suggest that, do you?

A. Oh, no.

Q. You do not mean to suggest that it is not the commonest thing in the world for a person wanting to either repair, [fol. 282] equip, supplement or initially introduce heating equipment, to have one kind of a boiler—"kind" in the sense it may be made by you or by any competitor—in the cellar, and connect to radiators made by somebody else in the rooms of the building?

A. You are correct, except as far as repairs are concerned.

Q. Well, I mean by repairs this: Suppose I have got one of your boilers in my cellar, and I don's like my radiators. I prefer some modern radiator that sits under the window and looks pretty. I go to my local plumber and ask him for some of those pretty, stylish radiators, and he shows them to me, and I tell him to install them. That does not in any sense mean that my furnace has got to be disturbed, even though the furnace has been made by you and the radiators are being furnished by your competitor?

A. Just so long as they have the capacity.

Q. Yes,—that doesn't mean that my plumbing contractor is going to ask me, "Well, what kind of a boiler have you got?" and when I tell him I have got a National Radiator boiler, he is going to tell me that he sells only American Radiator radiators and that I had better go over to the fellow across the street and buy my National Radiator radiators over there, to go with the National Radiator boiler which I have got in my cellar?

A. It wouldn't be necessary.

Q. No, and it wouldn't be done.

A. It might be done, if you went to a contractor that handled only National product and you wanted American; he would probably tell you to go over to theAmerican and get it.

[fol. 283] Q. Suppose I don't want American; suppose I want the type of radiator that pleases me——

A. If he handled it, he would give it to you; if he did not, he would tell you where to go and get it.

Q. But if he didn't handle it, he wouldn't send me away because he didn't handle the type of boiler I had in my cellar, or vice versa? Isn't that right?

A. Yes.

Q. Or if my boiler had blown up, and I went to him, he would sell me a competitor's boiler, if he was handling

competitor's boilers, without regard to what kind of radiators I had in my rooms. Isn't that so?

A. He couldn't sell you repairs from our boilers to fit another boiler of another manufacturer.

Q. I am not saying he could.

A. He could sell you a complete boiler.

Q. He could sell me a complete boiler?

A. Yes.

Q. He would sell me a complete boiler, and he wouldn't send me over to his competitor because I had radiators from his competitor? Isn't that so?

A. No, not because you had the radiators. It depends on what you wanted to buy.

Q. I thought you understood my question. My question is this: And I will put it in another way: Isn't it a matter of fact that there is wide open competition between all of you, whether for the sale of complete units, boilers, radiators, and the rest of it, or for the sale of radiators separately or boilers separately? Isn't that a fact?

A. That is a fact.

[fol. 284] Q. And isn't it further demonstrated by the fact, I think already testified here, that there are plenty of people engaged in only one end of the business—and I mean by that there are corporations engaged in the business of solely manufacturing and selling radiators, and there are other corporations engaged in the business of selling only boilers?

A. And those people usually supplement their line by buying their boilers or radiators from other manufacturers, so that they will have a complete line.

Q. Now then, tell me again, because I am at a complete loss to understand what you mean by stating to the Court—I don't mean to say that invidiously, but I don't get what the meaning was of your statement that there was complete lack of interchangeability here.

A. I mean this, Mr. Royall: If you have an American radiator in your living room, and it develops a leak due to corrosion, or sand hole in it, or you leave the window open and it freezes, you can't replace the section or sections in which defects or the freeze occurs with one of ours. You can't do that; you have to replace the entire radiator with our product or go to the American for the replacing section.

Q. Then all you meant was the question of repairs, that your radiators have got to be repaired by you people or by repairs furnished by you people, and the others by the others; and the same applies to boilers?

A. There is not an interchangeability, the same as you find in the pipe business for instance.

Q. Well, in the same sense there isn't interchangeability [fol. 285] between a Ford car and a Chevrolet, there isn't interchangeability between boilers or radiators manufactured by competing companies? That is what you mean?

A. That is correct, yes.

Q. And that is all you mean?

A. Well, you can't put our radiators in the spaces provided for certain other competitive products, due to the difference in the height and width of radiators.

Q. But there is a selection of style, of course?

A. Not style; I am talking about dimensions.

Q. Well, dimensions as part of style. I think we made that clear enough. Now, you had something to say about the business curve, that in the radiator and boiler business the business curve was going up until the end of 1928. Is that what you said?

A. I said that from 1928 to date the aggregate square feet of floor surface in residential construction declined.

Q. Well, when did it start declining?

A. In 1929.

Q. It started declining in 1929?

A. From 1928 until 1929.

Q. The curve kept going up until you crossed January 1, 1929?

A. 1928 was the peak.

Q. And can you plot the curve any closer than January, 1929, when it started to dip?

A. It started to dip—I have my figures here by years. It started to dip in the fall of 1928.

Q. And the building business for the year 1929, stated in percentages—I suppose this is on the basis of building business?

[fol. 286] A. This is on the basis of aggregate square feet.

Q. Of building?

A. Residential.

Q. What is the percentage, roughly stated, of the decline of 1929 below 1928?

A. Roughly, the decline was about thirty per cent—thirty-one per cent.

Q. State the aggregate figure in this case.

A. 1928, the building construction averaged per month 47,365,000.

Q. Forty-seven against?

A. 32,306,000 in '29.

Q. Then give us 1930, reading the figure corresponding to the 47—and 32——

A. 19,470,000.

Q. Give the 1931 figure.

A. It is 15,856,000.

Q. Is the trend still coming down or has it started to go up?

A. The forecast by the F. W. Dodge Corporation for the first quarter of this year indicates there probably will be about $180,000,000 in residential building construction, which is about ten per cent below the corresponding period a year ago.

Q. Is it below the end of 1931?

A. No, it is a little above that.

Q. So that the trade is reviving from the bottom of the curve?

A. No, you cannot compare the end of the year with the beginning of the year. You must compare the same quarters.

Q. You stated on direct examination that whereas your [fol. 287] earnings for the four months, last four months of 1927 were $900,000 plus, for four months, that your earnings for each subsequent year, to date, had shown a deficit—that your operations for each of the subsequent years show deficits well over a million dollars for each of those years. Are you able to reconcile the change of earnings on the basis of $2,700,000 a year for those four months of 1927 to a loss of—What was your loss for 1928?

A. $1,343,000.

Q. Yes—to a loss of $1,343,000—a shift of four million dollars in those years, 1927 and 1928?

A. I would say that it was due largely to the result of the consolidation, which meant that the new corporation could not continue to handle the type of business that was done by two of the predecessor corporations. In other words, the Niagara Radiator & Boiler Company and the

Continental Heater Company business was largely made up of what they call mail order business and some "direct to you" business, as they refer to it in the trade; whereas the other companies, particularly the National Radiator Company, sold direct to the heating contractor and the jobber. And that type of business handled by Niagara and the Continental, they simply had to give that up.

Q. But I have directed your attention to the operations for the first four months of the new corporation, which you stated showed a profit of $900,000 to the new corporation, when you were operating on this consolidated basis. How do you account for the fact that, although you could operate for four months upon the basis of such excellent profits, that for the next twelve months after those four [fol. 288] months you could only operate at such a tremendous loss?

A. Well, I explained part of the reason for that—due to the fact that at the end of the year we were obliged to give up a very lucrative part of our business.

Q. Why did you give up a business that was so lucrative that it would make $900,000 in one third of a year, for the purpose of conducting business in such a fashion as to produce over a million dollars of loss?

A. I have explained to you that the corporation couldn't carry water on both shoulders, that two of the units, two of the predecessor companies, did a kind of business that could not be carried out by the consolidated corporation.

Q. Well, you carried the water on both shoulders for four months. Is that right?

A. We did.

Q. And you made $900,000 doing it; and then you let the water go off one of the shoulders, and since then you have been making losses of over a million and a half?

A. We were obliged to give up that class of business, yes.

Q. Obliged by what?

A. Customs of the trade; the jobbers and heating contractors, or so-called legitimate trade.

Q. What was the particular class—

A. Mail order business, or "direct to you."

Q. Now, let us get down to the inventory. I think you have already corrected the erroneous impression that I at least had gotten from your testimony as to this interchangeability as relating to inventory.

[fol. 289] Mr. Teall: Well, I don't understand him to have corrected anything. He repeated what he said in his direct.

The Court: Well, let us get along as quickly as possible, and come to the tangible.

Q. How much of the inventory as at the date of the receivership remains uncollected at this moment?

A. How much of the inventory?

Q. As to the date of the receivership, remains undisposed of—I said uncollected. I will change that to "undisposed of." Approximately will be quite satisfactory.

A. My figures show notes and accounts receivable——

Q. I am talking about inventory. How much of the inventory remains undisposed of?

A. Around $1,634,000.

Q. Of the inventory that you had——

A. That is the inventory of product.

Q. That is the present inventory of the property in the hands of the receiver now?

A. No; I understood you to mean the inventory of the product for sale. I speak of receivers' inventory, when you refer to the other.

Q. I will strike it all out. Now, let me put the question. What was the amount of the inventory as at the date of the receivership? I find the figure $2,048,901.97. Do you care to look at this (handing paper to witness)? You may adopt it, subject to correction, if you like.

[fol. 290] A. Yes.

Q. How much is the inventory presently, now, in the hands of the receivers?

A. The total?

Q. Yes.

A. That I will have to compile for you.

Q. Give it to me roughly.

Mr. Teall: At the present time, Mr. Waters.

Q. Yes, at the present time. Give me what the present inventory is.

A. Are you speaking of the receivers' inventory or are you speaking of our inventory of product?

Q. Well, I don't understand any difference between those two terms.

A. Well, apparently there is. I don't get you.

Q. I want to know how much stuff in the way of manufactured and partly manufactured—so-called—stuff there was when you were appointed, and that therefore went into the hands of the receivership, and how much of that same kind of stuff there is now, whether what there is now is made up partly—whether it remains what was undisposed of at the date of the receivership or whether it was made up partly of inventory that the receivers manufactured?

A. I understand you now. At the time of the receivership, October 8th, there was $2,048,000 inventory; as at the first of the year there was $1,634,000.

Q. Now then, during the period between the appointment of the receivers and the first of the year, the first of this year—That means, of course, the first of 1932?

[fol. 291] A. Yes.

Q. ——and the first of 1932, the receivers, under authority obtained by them from the court, have been manufacturing further merchandise, inventory. Is that correct?

A. They have been manufacturing and selling.

Q. To what extent have the receivers manufactured? An approximate figure will be satisfactory.

A. We produced in radiation for the month of October, 338,000 feet; month of November, 348,000; month of December, 301,000.

Q. I would rather have it stated in cost, rather than footage.

A. And in boilers—In boilers we produced 766,000 pounds, 1,384,000 pounds, and 804,000 pounds.

Q. Will you translate those figures into costs, roughly? If you know what they cost, roughly, you can tell the Court, as far as I am concerned.

A. Oh, I would say around 3½ cents a pound on boilers, and about 15 cents a foot on radiation.

Q. Well, can you make a lightning calculation here, an approximate calculation, about what that would spell in dollars and cents? An approximate figure will be satisfactory.

A. Around $235,000. That is very rough.

Q. The receivers have diminished greatly their rate of manufacture. Is that right?

A. We have, yes.

Q. At what plants are you making what you speak of as radiation—I suppose that means radiators—Where are you doing that?

A. Johnstown.

[fol. 292] Q. Johnstown National. That is the only place you are doing that. And where are you making boilers?

A. New Castle.

Q. That is the only place you are doing that?

A. Yes.

Q. Are those plants being run by the receivers actively?

A. Are they what?

Q. Are they being run full blast?

A. Oh, no. We are running five days a week at Johnstown and three days at New Castle.

Q. Now, can you calculate for us roughly how much of the inventory that came into the receivers' hands at their appointment still remains undisposed of? Do you understand that question?

A. Yes; if you and I are thinking of inventory in the same way.

Q. Well, apparently you and I are confused about inventory. How much of the manufactured and partly manufactured and raw material that you include under the general head of "inventory" of radiators, boilers, and things respecting them, that came into your hands as receivers on the date of your appointment, and which you carried in your inventory filed here—under the description of "inventory"—and which was put in there at $2,048,901.97—How much of that item of $2,048,901.97, if any, has been sold by the receivers? Now, is that clear?

A. Yes.

Q. Well, please answer.

A. Our sales from October 9th to October 31st amounted to $486,469.95, less the freight of $18,642.74, left a net sale value of $467,827.

[fol. 293] Q. That is what you received for the inventory?

A. Yes.

Q. But you sold it at more than cost, didn't you?

A. Yes, that is what we received. That is for the month of October.

Q. Just for the month of October?

A. Yes.

Q. You received for part of your inventory four hundred thousand dollars gross. Have you got any figures as to what you received for the rest of the inventory that you may have sold?

A. For the month of November, we sold $388,477 worth of product.

Q. There were some selling costs to be deducted?

A. Oh, yes.

Q. Go through a few months more there, and see how you make out, as long as you have the papers open.

A. For the month of December, our net sales amounted to $264,388.45.

Q. Now, you are down to December, 1930?

A. 1931—the end of 1931. These are what the receivers sold.

Q. When were the receivers appointed?

A. October 9th, last year.

Q. Oh, yes. I was confused for a moment. Have you got any figures for January and February?

A. No, I have not. We don't have the January and February figures here.

Q. I suppose you are familiar in a general way with what is going on, are you not?

A. Yes.

[fol. 294] Q. Well, can you state whether that was kept up at about that average, or less?

A. Yes, I can give you those figures, Mr. Royall.

Q. Well, I don't care to take up too much time—if you could state generally whether it has kept along about that way, or a little less or a little more?

A. To February 6th of this year we sold $203,953.

Q. But you are still making sales, are you?

A. Yes. They are falling off in about the same percentage below last year as they are shown here.

Q. The receivers then have realized already upon the bulk of the inventory. Is that a fact? That is, the bulk of the inventory as at the date of the receivership?

A. Our average receipts for the month—this is calculated over the year——

Q. No, I am talking about since the receivership. I don't think you heard me. (Question read.)

A. Oh, no.

Q. Well, these sales that you have been testifying about were made out of that inventory, weren't they?

A. Yes, but we have been producing too.

Q. Oh, you have been producing at nearly the rate you have been selling?

A. Not quite, no.

Q. Well, the fact of the matter is your inventory, including what you have produced, is now very considerably less than your inventory at the date of the receivership? Isn't that so?

[fol. 295] A. Yes. We show on hand now an inventory of product around 5,000,000 feet of radiation and around 14,500,000 pounds of boilers.

Q. Do you say that the stuff you had on hand when the receivers were appointed was obsolete stuff?

A. No.

Q. It was standard stuff?

A. There was some little obsolete, not very much, though.

Q. Broadly speaking, it was all good stuff?

A. All good stuff.

Q. And interchangeable with the same kind of stuff the receiver has been making?

A. Yes.

Q. Now, will you please tell us what the spread is between this cost—You have testified, I believe, that the cost of the boilers is 2½ cents a pound?

A. No, I said about 3½.

Q. Oh, I am sorry, I didn't mean to misquote you—3½ cents a pound, and that the cost of radiation was how much a foot?

A. About 12½ cents a foot.

Q. Now, what is the spread between that cost and the prevailing market value that you are selling your stuff for?

A. The prevailing market value of radiation is around 16 cents a foot.

Q. And boilers, stated in poundage?

A. Boilers around 5 cents a pound.

Q. But these inventories of the receivers as well as the inventories of the corporation, which you filed here, are all on a cost basis, are they not?

A. Yes.

[fol. 296] Q. And roughly stated, twenty-five or thirty per cent below the aggregate of the prevailing market value. Is that right?

A. That does not include the difference there—we have not taken into account the expense item.

Q. But it costs money to sell things, we understand that. Now, as to the accounts receivable, if you will direct yourself to that, and get the papers on that before you—and other receivables. Your inventory filed herein shows a total of notes and accounts receivable of $1,673,373.59 less $179,046.37 as reserved for bad and doubtful notes and accounts. Is that right?

A. Yes.

Q. Now, this is split up as follows: Notes receivable, Affiliated Company, $356,257.83—What is that?

A. That is notes on the Lincoln Niagara Corporation, affiliated.

Q. Who owns the stock of the Lincoln Niagara Corporation?

A. National Radiator Corporation.

Q. Anybody else own any?

A. No.

Q. Any part of it?

A. No, it is entirely owned by the Radiator Corporation.

Q. And that is merely a bookkeeping entry?

A. Bookkeeping entry.

Q. Notes receivable, regular, $145,579.77. "Regular" signifies something to your mind. What?

A. It means customers' notes.

Q. The next item is notes receivable, National Protective [fol. 297] Payment, $207,197.41. Will you translate for us the meaning of that?

A. Those are notes we have taken covering the sale of boilers and radiators to home owners, the notes of which are endorsed by the steam fitter, the man who installed the equipment.

Q. And what does the term "National Protective Payment" mean?

A. That is the name of the plan under which the material is sold.

Q. Where does the protection come?

A. It comes in this way: The purchaser of the material, his life is insured as an added advantage, so that if he

should die before the obligation is paid, the insurance money—the money received from the insurance company takes care of his obligation.

Q. And then you say that the obligation is also endorsed and guaranteed by some dealer, or someone?

A. It is endorsed by the man who puts it in there.

Q. That would be the plumbing contractor?

A. Yes, the heating contractor.

Q. Is there a corporation called the National Protective Corporation, or some such name?

A. No, it is just the name of the plan.

Q. Now, the next item is Accounts Receivable, regular, $945,539.07. "Regular" again signifies ordinary customers?

A. That is correct, yes.

Q. And who would they be? They would be jobbers, would they?

A. They would be jobbers and trade, as we call them—steam fitters—and a few consumer customers, not many; [fol. 298] probably five hundred trade jobbing accounts and fourteen hundred of the other, of the trade accounts.

Q. Now, these notes receivable, regular, we had a moment ago, they would be for the chief part jobbers.

A. No, they would be more from the trade than from jobbers.

Q. Well, distinguish, please, the difference between the trade and jobbers. I would suppose "jobbers" would signify the trade.

A. We distinguish in this way: Trade accounts are the small heating contractor who buys the material from the and installs it in the house. The jobber is the customer who frequently carries our stock in his warehouse. If not, he draws it from our warehouses and sells it to the trade, with pipe and fittings, and things that we don't manufacture or sell.

Q. I see. Now, the next item we find is Accounts Receivable, Special, $2,168.47. What is that?

A. That would cover material that would be perhaps sold to Lincoln or National Steel Boiler Company.

Q. Accounts Receivable, Employees, $6,691.04. What would that be?

A. That would cover an advance to an employee, cover material purchased by an employee through the corporation.

Q. What employee—an officer?

A. No. Employees in the plant and warehouses and officers. They can buy to advantage through reason of our purchase power, and we frequently allow them to do so, on the basis of our purchase plan.

[fol. 299] Q. Now, this largest item, Accounts Receivable, Regular, is $945,539.07. Do I understand you to say that includes nothing except accounts due from customers for materials sold?

A. That would be largely composed of accounts due for material sold, yes.

Q. I didn't say "largely"; I said, was it solely comprised——

A. Well, I can't say solely, to the last penny.

Q. Well, isn't there an account in here some place of an advance made from the Corporation to the corporation known as the National Steel Boiler Company, or some similar name—quite a large amount of money, $80,000?

A. Probably $80,000, yes.

Q. Eighty odd thousand dollars. Can you give me the precise amount?

A. It is around $86,000, as I recall.

Q. Now, was that incorporated in one of these items that I have read into the record?

A. Yes.

Q. In which one?

A. That would be covering—it is accounted for in this manner: the National Steel Boiler Company——

Q. I mean, which item——

A. I just wanted to explain it, so you will have a better idea—produces steel boilers for the Radiator Corporation, and the Radiator Corporation had been paying the bills of the National Steel Boiler Company and receiving credit—the Steel Boiler Company receiving credit for the boilers that we sold, which they manufactured for us. In other words, it is a bookkeeping offset.

[fol. 300] Q. Well, what do you mean by "paying the bills"?

A. I mean this: The National Steel Boiler Company was organized to produce steel boilers.

Q. Yes.

A. The Radiator Corporation was not in position to manufacture steel boilers. It was incorporated in 1929, April 18th——

Q. You mean the National Steel Boiler incorporated?

A. Yes—with an authorized capital stock of 1500 shares, $100 par value each. As of March 1st, this year, 630 shares outstanding. That company acquired a plant at Lebanon, Pennsylvania, particularly adapted to the production of steel boilers. Now, when the company started, it started on a limited capital, and the National Radiator Corporation owned the majority of the stock in that company; and since it was organized to produce steel boilers, and had no credit standing, the Radiator Corporation took care of the purchasers covering the plates and sheets and tubes, and so forth, for the Steel Boiler Company, and the Radiator Corporation sold those boilers to offset the amount that had been advanced to the Steel Boiler Company in that manner.

Q. Well, they furnished the finances for it?

A. Yes.

Q. And as the result of the furnishing of the finances, there was a balance remaining due as at the date of the receivership of this sum of $86,000——

A. Eighty some thousand dollars.

Q. $86,000, did you say?

[fol. 301] A. Around that, yes.

Q. Of approximately $86,000. Now, you say the National Radiator Corporation owned a large majority of the stock?

A. Yes.

Q. Of this corporation known as the Steel Boiler Company?

A. Yes.

Q. Who were the other stockholders?

A. The other stockholders were employees of the Radiator Corporation and officers of the Radiator Corporation.

Q. Will you name the stockholders?

A. The stockholders consisted of John H. Waters, Samuel B. Waters, Robert S. Waters, Carl E. Resley, Edgar W. Longacre, John E. Jacob, John Walter Jacob, and other employees of the company.

Q. Is this a patented device, this steel boiler?

A. There are patents pending on certain features of the boiler. The smokeless device is part of it——

Q. Under whose experimentation were the patents and the device devised?

A. Under my direction.

Q. Are you the applicant for the patent?

A. No.

Q. Who is?

A. William H. Hagerty, manager of the Steel Boiler Division.

Q. Steel Boiler Division?

A. That is the division of the Radiator Corporation that handles the sale of the steel boilers.

Q. Was Mr. Hagerty the inventor?

[fol. 302] A. Was he the what?

Q. Was he the inventor?

A. Applications were filed in his name.

Q. I heard you say that. I asked you if he was the inventor.

A. Part of it, yes; probably co-inventor, you might say.

Q. You and he were co-inventors?

A. Of part of the devices, yes.

Q. Has the National Radiator Corporation a laboratory in Johnstown for experimental work?

A. We do.

Q. Was the experimentation leading up to the making of this invention conducted in that laboratory?

A. No, it had been conducted, some of it, prior to the acquisition of the laboratory.

Q. But it was conducted in a steel laboratory somewhere?

A. No; the features of it were conducted at New Castle, the old Radiator Company. We were simply adapting the device developed by our old company to the steel boiler, which consisted of eliminating the refractory brick wall and substituting therefor the — brick wall.

Q. Well, without going into details of the invention, suffice it to say that the invention was worked up in the laboratories of the plants of the National Radiator Corporation by you and Mr. Hagerty and perhaps other employees of the Corporation. Is that right?

A. That is right, yes.

Q. And the money to finance the patents for these boil-
[fol. 303] ers in this invention was furnished by the National Radiator Corporation?

A. Yes.

Q. And the National Radiator Corporation owns what percentage of the stock?

A. Something over fifty per cent. I don't recall the exact figures.

Q. You mean the bare majority or the exact figures?

A. The bulk of it.

Q. Well, come as close to it in percentages as you can.

A. I would say about sixty per cent.

Q. And the other forty per cent belong to employees?

A. Yes.

Q. Do you know whether those employees regard themselves as holding that stock in trust for the Corporation, or do they hold it for their own benefit, as stockholders in their own right?

A. Their own right. They paid for it themselves.

Q. Now, are there any other accounts receivable reflected by these general items which would come under the description which you have given of regular customers' accounts? Are there any other explanations required to qualify your general statements that these were customers' accounts?

A. Not that I recall.

Q. Aside from this qualification you made about the transaction with the Steel Boiler Company, these accounts are customers' accounts?

[fol. 304] A. Yes.

Q. And notes—the notes as well as accounts?

A. Yes.

Q. Now, you have got these reserves here of $179,000. In computing that reserve of $179,000 do you apply any of it against this item of $366,257.83, the affiliated company account?

A. That only includes customers' accounts, reserve.

Q. You don't apply any of it, then, to this account of eighty odd thousand dollars that is applicable to the——

A. I don't think we have, no.

Q. Due from this affiliated company. In giving your opinion to the Court as to the value at which these properties should be taken over by you and your associates, did you consider that this $86,000, affiliated company was sub-

ject, along with the rest of them, to these very large depreciations or diminutions that you have testified to?

A. Why, I figured in this way. The receivers have a mortgage on the Lebanon boiler plant—the National Steel Boiler plant.

Q. Beg pardon?

A. The receivers have a mortgage running to our benefit on the plant at Lebanon, which we would feel could be liquidated for the value of their indebtedness to us.

Q. Oh, the receivers have taken a mortgage?

A. Oh, yes, to protect ourselves.

Q. Merely a mortgage of the corporation?

A. Mortgage on the property of the National Steel Boiler Company.

[fol. 305] Q. It is not guaranty of the indebtedness by any individual?

A. No.

Q. Now, tell us about this steel boiler business. Is it a valuable thing?

A. Yes, we consider it is a necessary adjunct to the business of the Corporation.

Q. That is rather a new departure in the art, is it not?

A. No.

Q. To have steel boilers for radiation generally?

A. No, it is not.

Q. Well, it is certainly most common practice, the old practice, to have cast iron boilers, isn't it?—The orthodox practice is to have cast iron boilers—I will put it that way?

A. For small installations, yes; for large installations, steel boilers.

Q. Of course, we all understand in a power generating plant, or factory, steam for power, and all that sort of thing, is generated, and they have these huge steel boilers—they are not cast iron?

A. Yes. These are low pressure boilers.

Q. But the low pressure steel boilers is a departure, isn't it?

A. It is comparatively new for the National Radiator Corporation, yes.

Q. Now, are these steel boilers that you are making designed as a substitute in use and practice for what I may speak of as the orthodox, old-fashioned cast iron boiler?

A. They are being used by steam heating contractors in preference to cast iron.

[fol. 306] Q. Well, are you marketing them for that purpose?

A. We are marketing them the same as we market our cast iron boilers.

Q. I mean, do you present them to the market as an alternate or substitute for the orthodox cast iron boiler?

A. Yes, because our cast iron boilers do not have the capacities of our steel boilers.

Q. So it is not merely for special uses, but this is a new departure in the art, in the trade, for general heating, isn't it?

A. No, it is not a new departure. They have been making steel boilers for years. I said it was new to the National Radiator Corporation.

Q. Now, who has been making steel boilers for years and marketing them——

A. Kewanee Boiler Company.

Q. —for purposes of general domestic use, and that sort of thing?

A. Kewanee, Titusville, Oil City Boiler Company, Fitzgibbon—among the more prominent ones.

Q. Well, it is a new departure for your business, at any rate?

A. Yes.

Q. Now, then, you have some exclusive features, I gather, in your steel boiler which do not pertain to these Kewanee ones and such that your competitors have been making. Is that right?

A. We feel them to have. The patents have not as yet been allowed; I don't know whether they will be.

[fol. 307] Q. Your departures in mechanical practice which you are endeavoring to have patented, are they improvements?

A. We consider they are advantageous, yes.

Q. Do you consider them a great improvement in the art of low pressure boiler manufacture, as heretofore manufactured by others?

A. Yes, we do.

Q. Would any such extensive departure, if patented exclusively, be a very valuable thing to own?

A. It would be advantageous, yes. It would be hard to evalute the value of it, though.

Q. Well, you look upon it as an important thing, don't you?

A. It is; otherwise, we would not have applied for a patent.

Q. Well, let us see how important you think it is. Lots of people apply for patents on things that they do not think are so very important. Is this in your opinion a really vital, important departure in the art of heating, as heretofore practiced?

A. Which—the invention for which we have filed patent application?

Q. Your invention under which you are manufacturing these things.

A. I don't consider it is vital, no. I consider it is an improvement.

Q. You consider it an improvement in the art?

A. We consider it an important improvement on this particular type of boiler. I don't state, however, that the boiler could not be made and would not function without it. They have been for years.

[fol. 308] Q. Now, tell me this: How long have your salesmen been presenting this boiler to the trade?

A. They have been selling steel boilers——

Q. These steel boilers, we are talking about.

A. The past year, 1931.

Q. The manufacture of the thing has been perfected, has it?

A. Yes.

Q. And it is in the trade, it is being produced and sold?

A. Oh, yes. We sold boilers for four months in '30—the last four months of the year.

Q. Please tell the Court what the development in that trade has been during the year?

A. The development has been very slow. Our sales have been relatively small, because it is difficult at this time to introduce new boilers. A boiler of this type has to be sold through the architects and engineers. It has to be accepted by them. You don't sell them direct to the home owner, the house owner.

Q. Are they less or more expensive than cast iron boilers of the same capacity?

A. They are about the same cost.

Q. What are the utilitarian advantages of such an arrangement over the old cast iron boiler?

A. The quick steaming, they generate steam more quickly than the cast iron, by reason of the tubular construction.

Q. And is that an important improvement, in your opinion?

A. It is for a large building project, yes.

Q. Well, isn't it advantageous for any situation?

[fol. 309] A. Your small boilers cannot be made as easily adaptable in steel as they can in cast iron for small residential work.

Q. Now, as to larger operations, except in the smallest operations, it is a departure which is a distinct improvement over previous practices. Is that right?

A. Beyond certain capacities, yes.

Q. I qualify it as to that.

(Recess taken until 1:30 o'clock P. M.)

Afternoon Session

ROBERT S. WATERS RESUMED

ROBERT S. WATERS resumes the stand.

Cross-examination (continued):

Mr. Royall: I think a while back, when we had the witness refer to the bankers' circular, I neglected to have it marked as an exhibit. I offer it, and ask that it be marked Intervenor First National Bank of Cincinnati Exhibit No. 1.

Mr. Teall: This has not been identified, as far as I know.

The Court: I don't know whether it has been identified sufficiently.

Mr. Royall: It was produced by Mr. Bennett, or Mr. Ludington, Mr. Bennett's associate.

[fol. 310] Mr. Teall: I didn't understand it was offered in evidence.

Mr. Royall: I do offer it in evidence.

Mr. Teall: It has not been identified at all, as far as I know.

Mr. Royall:

Q. Mr. Waters, the paper I show you bears the marking First National Bank of Cincinnati, Intervenor, Exhibit No. 1" of this date, purporting to be the bankers' circular upon issue of the $12,000,000 bonds, and I ask you if you know what that paper is?

Mr. Teall: If you will let me interrupt. If you want it in evidence, we have no objection.

Mr. Royall: Very well then. I offer in evidence the paper purporting to be the bankers' circular, on the National Radiator Corporation, on the bond issue of August 1, 1927, bearing the mark "First National Bank of Cincinnati, Intervenor Exhibit No. 1." It is received in evidence, I take it?

The Court: Yes.

Q. Now, you testified, I believe, that the $179,046.37 item of reserves was applied entirely to the notes and accounts receivable. Is that right?

A. I did, yes.

Q. I would like you to state whether or not, in computing [fol. 311] these reserves, in whatever method of procedure, percentages or otherwise, was employed in respect of the various classifications of notes or accounts, and in that connection I direct your particular attention to the item entitled "Notes receivable, National Protective Payment, $207,197.41." Will you answer the question?

A. I don't understand the question.

Q. In arriving at the figure of one hundred seventy-nine odd thousand as reserve against bad and doubtful notes and accounts receivable, did you or did you not follow or adopt any method whatever as to the classifications of these notes and accounts receivable, and in that connection I direct your particular attention to the item "Notes Receivable, Protective Payment, $207,197.41"?

A. The usual method was followed in preparing the reserves, setting them up.

Q. Well, describe what you adopted as the usual method.

A. It has been our practice in preparation to set up a reserve around three per cent against certain items until they were completely adjusted at the end of the accounting period.

Q. Against certain items?

A. Yes.

Q. Well, by what standards did you put the items in the category for the purpose of the application of the three per cent discount?

A. They would be against accounts which seemed to show evidence of being a little slow in collecting.

Q. Did you apply this method in the same way in respect [fol. 312] of these accounts comprising item "Notes Receivable, National Protective Payment," as you did generally in respect of accounts and notes receivable from customers?

A. I don't recall that particular point, Mr. Royall. I would have to look it up.

Q. Well, whatever you did, in arriving at this figure, will you tell us now whether or not the notes constituting the group or class known as the National Protective Payment group are—shall we say safer, more collectible, or less safe and collectible, than the notes and accounts of the customers generally?

A. I would say they were about equal.

Q. In other words, you would say there was no particular virtue in this National Protective Payment plan?

A. Oh, yes, there is, from the standpoint of getting business, increasing our sales.

Q. It has nothing to do with the question, no relation to the question of credit? You know what I mean by "credit"—the soundness of credit, value of credit?

A. That feature is gone into at the time sale is made, or rather, before sale is made; but it has not been selected by reason of being particularly advantageous from a credit standpoint. It has been selected as a means of increasing business, provided the credit is satisfactory.

Q. Well, I understood you to testify that the sum and substance of the plan was that these accounts had the security or the guaranty of endorsement of a third party, who would be the plumber or jobber or somebody, so that [fol. 313] they were two-party notes instead of one-party notes; and in addition there was a life insurance arrangement to give further protection. This additional party endorsement and this life insurance arrangement was all directed, was it not, to added credit responsibility?

A. It was added as an attractive feature for the buyer.

Q. You mean to say, it is more attractive to the buyer to go out and get some life insurance and get some third party to endorse his note than it is to take the property on his own credit, without having to bother with the life insurance or with the third party endorsement? Is that what you intend to suggest?

A. I mean to convey this idea: that in presenting the sale of our product in accordance with the plans of the National Protective Payment Plan, we do so in a way that it attracts the householder to buy goods in accordance with that plan. It seems to give him ample protection, in that his payments are made to us, in event of his death prior to the liquidation of the notes or the obligation.

Q. Well, you regard this arrangement as giving ample protection to you, don't you?

A. Oh, yes.

Q. Now, then, after taking out of the aggregate of $1,673,373.59 of accounts receivable, as they appear on your inventory, the item of $356,257, which was the mere bookkeeping inter-company account, and therefore not a real account—after taking that out, and after taking out the account for the money, which is $86,000, more or less, which is owed to you by the Steel Boiler Company, we have ap- [fol. 314] plicable to a balance of about $1,300,000—between $1,300,000 and $1,400,000—reserve of a hundred seventy odd thousand dollars, or reserve at a percentage of considerably more than ten per cent. Do you regard that to be a large reserve as against the accounts to which it applies?

A. Now, your question was what, Mr. Royall?

Q. I called your attention to the fact, after eliminating from the aggregate of $1,673,373.59 receivables this purely bookkeeping or inter-company item of $356,257 and this item of the $86,000 owed from the Steel Boiler Company, which you have testified in respect of, we have a balance of between $1,300,000 and $1,400,000 as against which this reserve of $179,000 is applied and applicable. Is that right?

A. Yes.

Q. The reserve is only applicable to that much of it?

A. It is my recollection it is.

Q. Now, then, I call your attention that that reserve is approximately twelve per cent.

A. Yes.

Q. And I ask you whether or not, in your opinion, that is not a very high reserve?

A. In view of the present condition in the industry, I would say that it was not excessive; it would be wise to set up a reserve like that. We have failures occurring constantly among the smaller trade, and even some jobbing concerns.

Q. Well, I suppose you had written off from time to time the really stale accounts, had you not?

[fol. 315] A. Yes.

Q. In this aggregate before the reserve you only had left what would be called, perhaps, live accounts?

A. Yes.

Q. And it was against such accounts that you were setting up a reserve of approximately twelve per cent. Is that not so?

A. That is correct.

Q. Now, will you tell us, please, to what extent the accounts and notes comprising these items have been collected by the receivers?

A. That is something that I cannot give you right now. I would have to take the inventory and work it out for you.

Q. I suppose the receivers have been pursuing actively the business of collecting the accounts of the corporation?

A. We have, yes.

Q. Well, tell us generally with what success you have been doing that.

A. Well, the accounts as of December, about forty per cent of them were beyond the normal period of collection, which we consider—if twenty per cent are past due, that is about normal in this industry, but in December something over forty per cent were past due.

Q. Well, can't you tell us this without taking the time of the Court to go through the papers too meticulously? Tell us within a hundred thousand or two hundred thousand dollars, please, one way or another, if you can, more or less, how much of the corporation's accounts receivable the receivers have collected? We won't ask you to be too [fol. 316] accurate. Make it more or less, within two hundred thousand dollars.

A. As of December, we received on account of notes receivable from customers $13,932.24——

Q. You said as of December. Do you mean during the month of December?

A. The month of December, yes. Notes receivable from the Protective Payment plan $19,530.18; interest on customers' notes and others, $3,875.23——

Q. You are starting in the middle of the period, aren't you—starting in December?

A. Yes. I am going to work back to the beginning.

Q. Why don't you start with October? That was the first month. To save time,—would you be prepared to admit that you have collected more than half the accounts receivable since the receivership—the receivers have collected more than half the accounts receivable?

A. I can tell you here very well, if you will bear with me for a minute.

Q. All right. Starting with October, then, give us the detailed figures.

A. In October we collected from accounts receivable, customers, $410,173.14; accounts receivable, employees, refunds of advances and payments on accounts, $65.08; notes receivable, Protective Payment plan, $11,096.39; interest on customers' notes and notes $2,721.45; including the finance charges of the Protective Payment Plan notes $3,008.49. Then for the month of November; accounts receivable from customers collected, $477,249.73; accounts receiv- [fol. 317] able, employees, refunds on advances, $564; notes receivable, customers, $9,001.33; notes receivable, Protective Payment plan $18,358.01; interest, customers and others, $3,461.70; finance charges on Protective Payment Plan notes, $1,735.33. For the month of December, $368,322.86 accounts receivable, customers; accounts receivable, employees, refunds on advances or payments on account, $134; notes receivable, customers, $15,932.24; notes receivable, Protective Payment Plan, $19,350.18; interest, customers and others, $3,875.23; finance charges Protective Plan notes, $459.31.

Q. The last month there was December?

A. December.

Q. That is as far as you can take us now?

A. As far as I can take you now.

Q. Well, can you state generally whether the collections have been going along, shall we say normally and satisfactorily during January and February?

A. They have been more difficult in January and February.

Q. Well, have they been substantially in comparison with the collections during previous months?

A. Well, I would say they have been slower; I would say twice as slow.

Q. Well, in aggregate amount, have they been half as little?

A. No, I wouldn't say that.

Q. Well, have you collected, in addition to the figures that you have given the details of, a substantial amount on account of these notes and accounts receivable since December, 1931?

A. That I am unable to tell you.

[fol. 318] Q. You cannot tell whether you have collected a substantial sum or not?

A. Oh, we have collected some, yes.

Q. I asked you if you are prepared to say that you have collected a substantial amount?

A. What do you mean by substantial—a half million?

Q. Something substantial, as compared to the collections that are indicated by the figures heretofore given.

A. Yes, I would say so.

Q. Well, Mr. Waters, isn't it a fact that the aggregate of the collections you have made during the months of October, November and December is approximately equal, if not more—I haven't computed all these figures, excepting in my head, as you went along—but don't they aggregate more than the sum total of your notes and accounts receivable at the time of the inventory, after deducting this bookkeeping, inter-company account, deducting this $86,000 item from the Steel Boiler Company, and crediting the $178,000 reserve? After making those deductions and credits, you would have left less than a million dollars to collect, and you have collected it, haven't you?

A. We have accounts and notes receivable as of the first of the year, around $850,000.

Q. Well, those aren't more than the equivalent—that $850,000—of the receivables which were made by sales of the receivers? Isn't that so?

A. I can't say it was all made by the receivers, no, because some of that was on the record at the time of the receivership.

[fol. 319] Q. My question is this: Did the receivers make sales aggregating more than $850,000 during the period, October to December, 1931? I don't mean making cash sales. I wish to exclude that. Sales on credit, I refer to. I want to qualify that question to sales on credit.

A. Our sales from the time of the receivership to the first of the year were, roughly, around $1,119,000.

Q. Some of those were cash sales, I suppose?

A. Some, yes; most of them, under the usual terms of credit, sixty days.

Q. Well, did you think you created new receivables during the period mentioned aggregating more than eight or nine hundred thousand dollars?

A. I would say not.

Q. Well, then, it is a fact, is it not, before December 31st the receivers had already collected on account of receivables an amount at least equivalent to the receivables shown by the inventory herein, after crediting against reserves, crediting against the bookkeeping, inter-company account of $366,000, and crediting this $86,000 item from the Steel Boiler Company?

A. About the same, yes.

Q. The receivers, under the order which they have obtained from Court authorizing them to operate this business, have used care, have they not, only to manufacture merchandise which they believed to be marketable?

A. Oh, yes.

Q. The receivers have used care also, have they not, to [fol. 320] examine closely into the credits upon any goods which they may have as receivers sold upon credit?

A. Yes.

Q. Now, I should like to direct your attention to items that are on your inventory under the heading "Investments." I find there an item "Stocks $99,377.21". Will you tell me of what that is composed?

A. That included various capital stocks in hotels and other enterprises which were purchased at the time heating equipment was furnished to different concerns, or accepted as payments on account of purchase of our product—or rather, the corporation's product.

Q. Is that all it includes?

A. Principally, yes; includes some stock in the National Steel Tube Boiler Company.

Q. Oh, it does? It includes that, too, does it? I see. How much stock of the National Steel Tube Boiler Company does it include, how many shares?

A. I don't recall. Something over the majority; around 1,500 shares of the corporation.

Q. 1,500 shares outstanding, you say?

A. No, 6,300 outstanding—I mean 630 outstanding.

Q. Well, what did you say about 1,500 shares?

A. 1,500 was the capitalization.

Q. 1,500 was the authorized capital?

A. Yes.

Q. And 630 was the issued capital? Is that what you intend to say?

A. Yes.

Q. But you don't know how many out of that 630 shares belongs to the corporation?

[fol. 321] A. No, I don't; I would have to look that up.

Q. Well, will you look that up, please?

A. I can, yes.

Q. Now, can you tell us how much that is carried at on the books?

A. Around $55,000.

Q. So that this item of investments is chiefly made up of that—more than half?

A. And the hotel company stock, and stock in other enterprises who were furnished radiation.

Q. Do you know how that figure of fifty-five thousand odd, at which the stock in the Steel Boiler Company was carried, was arrived at for the purposes of your inventory.

A. It was the purchase price of the stock.

Q. You mean to say that the defendant corporation paid into the treasury of the——

A. Steel Boiler Company.

Q. —of the Steel Boiler Company fifty-five thousand odd dollars for stock?

A. Thirty-five thousand.

Q. I thought you said it was fifty-five?

A. No, thirty-five.

Q. Didn't you say it was fifty-five before?

A. No, thirty-five.

Q. But they paid other moneys—the defendant corporation paid other moneys besides this $35,000 into the treasury of the Steel Boiler Company?

A. It paid bills.

Q. Well, it paid their bills for them, all right. To what extent did they furnish money to them, or for them, beyond $35,000?

[fol. 322] A. In the neighborhood of eighty-three thousand, something like that.

Q. I thought you said eighty-three thousand, or eighty-six. I thought you said before whatever was the balance due upon advances—that was the balance due after certain credits. Didn't you say that?

A. Well, maybe I misunderstood your question. What was the question?

Q. Well, I asked the aggregate extent of the moneys they furnished them. It was testified eighty-six thousand was the balance due on the money.

A. Around eighty-six was the balance due, yes. I will have to look up and see how much was advanced.

Q. Do you want to give us a rough idea?

A. No, I do not. I would like to give you the exact figures.

Q. Well, I would like to have the exact figures, if it is convenient, but——

A. Well, it isn't convenient; I will have to look it up for you.

Q. Well, I say I would just as soon have a rough figure, if you can tell us what it is?

A. Well, I can't tell you that. I would have to find it for you.

Q. Will you do that?

A. Yes.

Q. Now, you have got under the title of "Investments" the item "Real estate, Edgewater Apartment Hotel, $51,172.31." What is that?

A. It is an apartment hotel in Chicago that was taken over by the company to liquidate a debt due the corporation.

[fol. 323] Q. Due from whom?

A. A heating contractor in Chicago.

Q. When did you acquire that property?

A. Acquired that several months ago.

Q. You mean recently, before the receivership?

A. Well, it was acquired about the time of the receivership, as I recall.

Q. Then the figure $51,172.31 written against it signified, perhaps, that that was the amount of the indebtedness for which you took the property?

A. Yes.

Q. Did you take it as security for the indebtedness, or did you take title to the property?

A. We have title to the property.

Q. Did you take it in satisfaction of the indebtedness, or merely take title as collateral security for the payment?

A. We have taken it in satisfaction of the claim.

Q. So it is yours in every sense of the word?

A. It is ours in every sense of the word.

Q. Is it a completed apartment?

A. Yes, as far as I know. I have never seen it.

Q. Is there a mortgage upon it?

A. There is, yes.

Q. Have you ever seen an appraisal of it?

A. No; I don't recall the appraisal of it.

Q. Have you taken any steps toward obtaining an appraisal of it by real estate experts in Chicago?

A. Not yet.

Q. Have you any information whatsoever as to what it is worth?

A. Based on the values at the time the apartment was [fol. 324] financed, I would say that it was worth today the amount of money which is represented here in our inventory.

Q. You mean that the equity in it is worth that?

A. I think so, yes.

Q. Well, have you received somebody else's opinion about what it is worth?

A. I would have to.

Q. You have?

A. Yes.

Q. So that you have had an appraisal of it in that sense—perhaps not a formal appraisal?

A. Not a formal appraisal, no.

Q. But somebody who you think knows about those things has given you an opinion of what it is worth?

A. Yes.

Q. Some real estate man in——

A. In Chicago; I don't know who he was.

Q. Well, I don't care who it was, but you have had the opinion of some Chicago real estate man?

A. Yes.

Q. Well, what was his opinion?

A. Something substantially above the amount that we carried on the books there; as I recall, around $75,000.

Q. Your best recollection is that his opinion was that your equity was worth $75,000?

A. The property was worth that.

Q. You mean your equity in it?

A. Yes.

Q. Now, there is another item under "Investments," [fol. 325] "Life insurance policies, cash surrender value, $18,934." I suppose that explains itself, doesn't it? They have a cash surrender value of that amount of money?

A. Yes.

Q. They can be converted at will into cash for that amount of money?

A. Yes.

Q. Now, there is an item under a heading "Special Deposits", "New York State Highway Bonds deposited with Department of Labor of that State, $15,550.40." Does the Corporation own those bonds?

A. Yes.

Q. They are a municipal—or state issue of the State of New York?

A. I don't recall the bonds.

Q. Well, you understand by "New York Highway bonds" an issue by the State of New York?

A. Yes. I can't give you the detail as to rate of interest and maturity, and so forth; I can't give you that.

Q. Well, you know what a municipal or state bond is, don't you, in that sense?

A. Yes.

Q. And they are such bonds?

A. Yes.

Q. And the price, or figure, $15,550 is cost, I suppose, of that investment?

A. I think so, yes.

Q. Are you of the opinion that those are realizable at approximately their inventory value?

A. I frankly don't know what the market price of these bonds is today, I couldn't tell you.

[fol. 326] Q. Well, the New York State bonds are selling a little bit better than four per cent, yearly basis—and most of them are Four Per Cents—and that would just about accord with your $15,550 cost valuation. They have not gone down an awful lot, New York States, a little perhaps. Now, how long ago did you make that investment?

A. I don't know. Those bonds were deposited to take care of the compensation insurance of employees in New York, but I don't recall when the bonds were required. My recollection is they were required some time prior to the receivership.

Q. You understand, by taking out and underwriting this insurance from an accredited insurance company, you could conform to the New York requirements in such a way as to have these bonds come back into your treasury?

A. Oh yes; yes, sir.

Q. So that, in that sense, they are always available to you to use as though they were cash? Now, Mr. Waters, upon direct examination you testified to an opinion of what you consider the items of cash, inventory, receivables and plants to be fairly worth, for the purposes of fixing a fair upset price upon a judicial sale, and you were asked by your counsel to proceed to give your opinion upon the basis of a principle or rule of procedure set down by Judge Wilkerson in a case decided by him, from which your counsel read an excerpt. Now, will you please state in your own way what you understood and understand to be the principle and rule upon which the valuations that you did give, in answer to your counsel's question, is? What rule actu-[fol. 327] ated you? What rule were you actuated by? State it in your own way. Paraphrase in your own way what you understood Judge Wilkerson's principle or rule of procedure to be.

A. My understanding of an upset price is this: It is a price that is fixed by the Court, below which the Court would not permit property to be sold.

Q. Because the minimum would be so low as to shock the conscience of the Court?

A. Perhaps.

Q. Well, I don't suppose you are putting yourself in the Court's place, and try to say for the Court what the Court ought or ought not to do in confirming some bid that might be made, or some sale here? You are not doing that, are you?

A. I don't intend to speak for the Court, no. That is my understanding what an upset price is, a price below which the Court would not sell, or would not permit the sale of a property.

Q. We will have to put it this way: That you are stating the price below which a Court should not confirm the sale?

A. Yes, that is right.

Q. And should not, because it would be such a low price that even you, substituting yourself for the Court, would say that you would be shocked at anything below that being acceptable to a Court because of its gross inadequacy. Is that right?

A. That is right.

Q. You didn't intend to express any opinion, did you, when you said that this inventory of $1,634,000, as it now stands, should be put in for that purpose for $327,000?-You [fol. 328] didn't mean to say that you do not think the receivers, in the course of the execution of their duty as such, in collecting upon the inventory now in their hands, cannot get more than $327,000 for that? You don't mean to say that, do you?

A. I do; that is my opinion.

Q. Do you mean to tell this Court, in the face of the fact that you have testified here upon cross examination that the receivers have collected—have sold a very large part of the inventory of this corporation at prices substantially greater—at least twenty or twenty-five per cent greater—I will just say substantially greater than the inventory prices—You don't mean to suggest to the Court that the remaining inventory of $1,634,000 cost, that you can only fairly anticipate $327,000 on it? If that is what you want to tell the Court, say so.

A. I do, if you propose liquidating.

Q. Well, aren't you liquidating now?

A. If you propose carrying on the business, operating the business, I say no.

Q. Well, let us analyze that. Your customers know they are dealing with receivers, don't they?

A. Yes.

Q. Your customers know when this receivership is going to terminate?

A. Do they know it?

Q. Yes.

A. No.

Q. Do they know how it is going to terminate?

A. No.

Q. And these receivers, as such, and notwithstanding [fol. 329] that they are receivers, nevertheless, have been able to collect a great deal more money on inventory, all told, than they have left to collect on?

A. Yes.

Q. Is there any reason that you can point to why, notwithstanding that they are receivers, they cannot continue to do so?

A. As long as we continue to operate the business of the Radiator Corporation as a going concern, we will continue —should be able to continue to do business in about the way we have done it since the receivership. However, if we were to announce tomorrow that we were liquidating the affairs of the Radiator Corporation, in my estimation inventories would shrink to about the figure that I have given you.

Q. Is there any occasion to announce tomorrow that you are going to liquidate the National Radiator Company in every sense, even though tomorrow you were going to do so?

A. No, but it would become known very quickly, because we would soon be unable to furnish a balanced line of product, which in itself is an admission of liquidation.

Q. Well, don't you keep your produce as well as you can in balance?

A. Yes, but that doesn't mean you can continue to furnish a balanced product to meet the varying demands of the trade.

Q. Well, the time would come—I can't quite understand——

A. And it comes very quickly. With the inventory low, as it is today, Mr. Royall, you have to constantly be chang- [fol. 330] ing the patterns in your foundry, otherwise you will build up an inventory which is undesirable at this time.

Q. Mr. Waters, so far as you have given any specific

figures here as to realization upon inventory—and those were for the months of October, November and December—they show, as I recollect, an average of over $400,000 a month. Is that right?

A. Not quite $400,000.

Q. Well, a little under $400,000. Is that it?

A. Yes.

Q. Well, upon that basis, within one month from now, if you started manufacturing, you would have every reason to believe that you would sell $400,000 of the stuff, wouldn't you?

A. If within a month we started to manufacture?

Q. No, if today you stopped your operations, is there any reason in the world why within a month from today you should not have sold $400,000 of the inventory? You sold $400,000 in December——

A. Our sales for January are below December.

Q. Well, whatever the average has been, not being technical, whether it is a little bit above four hundred thousand or a little bit below four hundred thousand. But whether you admit or not, it is plain upon the face of things that it must be so?

Mr. Teall: Plain that what must be so?

Mr. Royall: Plain upon the face of things that the inventory, if it is a standard and merchantable article today, is a standard and merchantable article tomorrow—even [fol. 331] though Mr. Waters made up his mind when he went to bed tonight that tomorrow he was going to stop operations.

A. Provided we had a sufficiently balanced stock. I pointed out yesterday there are over three thousand parts in our boiler inventory, there are four hundred and some in our radiation. Now, you can't do business with a low inventory and be prepared to meet all the demands of your trade, when you are handling quantities—handling as many and as great a variety of parts as we are.

Q. Well, you have testified here that your effort is to keep your inventory in proper balance?

A. We have, yes.

Q. And I suppose your experience in the business has enabled you by careful methods to accomplish that to some extent. And the time certainly would not come immedi-

ately—you don't mean to tell me, and the Court, that the time would come immediately, or tomorrow, or even quickly, comparatively speaking, when your inventory would be out of balance?

A. Yes, I do; for this reason: We are carrying stock of radiation and boilers at Framingham, Massachusetts, we are carrying stocks at Garden City, at Brooklyn warehouse, we are carrying stocks at Baltimore, Washington and Richmond, we have a stock of radiation and boilers at Chicago, at Cincinnati. Now, how we can maintain those various stocks in balance, and not continue to produce, is beyond my comprehension.

Q. Do you want me to tell you—and I am not a business man?

[fol. 332] A. I would like to have you tell me.

Q. If you have got more radiators, as it might happen, in your warehouse in Baltimore, or some other place, than you have boilers to go with them, and if you have got more boilers in Chicago than you have radiators to go with them, and a few more of this and that, less and more, here and there, why, ship the bloomin' boilers from the place where they are to the place where they are needed, and vice versa.

A. Your customer is not going to wait for you. If you don't have it on the job, he won't take it. That sounds very good, but it isn't practical.

Q. Well, I don't believe it is so terribly great a difficulty——

A. Why, of course it is.

Q. —that you have got to throw the stuff away, that you have to throw it out of the window.

A. Of course it is. It is one of the evils of this industry today. Everybody is carrying stock all over the country, and if you can't make shipments immediately, why, you lose the order.

The Court: Very interesting argument, you are having, but suppose we get a little testimony in.

Mr. Royall: I think your Honor's remark is quite called for. I apologize.

Q. Are you bearing in mind, Mr. Waters, while talking about this inventory, that as the receivers do sell it in normal course they get more for it than they are carrying it for —that the spread between selling price and cost is there.

[fol. 333] Are you overlooking that in telling the Court that you think the best they could realize on this is $327,000?

A. I have taken that into consideration.

Q. Very well. We will leave that subject. Now, we come to receivables.

Mr. Royall: I have not finished with the witness, your Honor, but I have been asked to suspend, for the convenience of another witness.

(Witness temporarily withdrawn.)

TESTIMONY OF R. B. FLERSHEM

R. B. FLERSHEM, a witness produced on behalf of the complainants, having been duly sworn, testified as follows:

Direct examination.

Mr. Teall:

Q. You are one of the complainants in this case, are you not?

A. I am.

Q. And a member of the reorganization committee?

A. I am.

Q. Where do you reside?

A. Buffalo, New York.

Q. What is your occupation?

A. Banker.

Q. Connected with what institution?

A. Marine Trust Company.

[fol. 334] Q. In what capacity?

A. Vice president.

Q. How long have you held that position?

A. Five years next September.

Q. What was your business before you became connected with the Marine Bank & Trust Company?

A. I was in the American Radiator Company.

Q. How long?

A. Twenty-five years.

Q. In what capacity?

A. From a cub salesman to vice president, in charge of sales.

Q. How long were you vice president, in charge of sales?

A. Eight years.

Q. What was your connection, if any, with the National Radiator Corporation prior to the receivership?

A. I was asked to become a chairman of the executive committee, which I did on September 1, 1928.

Q. And continued in that position for how long?

A. Until the receivership.

Q. Did that enable you to become generally familiar with the problems and affairs of the National Radiator Corporation?

A. In a general way, yes.

Q. What is the position of the American Radiator Corporation in the industry from the standpoint of the volume of its business? Is it a large concern or a small concern?

A. It is dominating in the industry. I don't know just what percentage of the total industry it represents now, [fol. 335] but the last year I was with it it sold nearly half of all the boilers and radiators sold in the United States.

Q. While you were in charge of sales for the American Radiator Company, did you have any experience in the liquidation of obsolete radiation and boiler stock?

A. Yes, that was constant, due to improvements in product. We had a monthly inventory of obsolete product, both boilers and radiators. For example, where we sold a hundred thousand boilers a year, we would perhaps have a hundred obsolete boilers to sell during a year. We found it more difficult to sell an obsolete boiler at a discount of forty-five or fifty per cent from the regular price than to sell regular product at the regular price, because there is not any market for an obsolete product.

Mr. Royall: I don't want to interrupt unnecesarily, but I don't see the materiality of this. The testimony of the general manager and the chief receiver is that there is no obsolete stuff in this inventory.

Mr. Teall: It has also been testified that it all becomes obsolete as soon as you go out of business.

The Court: Go ahead.

Q. Now, do your duties in your position with the bank involve any connection with the real estate market?

[fol. 336] A. Yes, I have charge—I am the president of the company that has title to all the real estate that has been taken over by the bank during the past year or so—longer than that. The past few years—in liquidation of debts.

Q. The properties that you have had to do with, have they been residential properties or industrial properties, or both?

A. All kinds.

Q. Confining your answer to the present time, and for, say, six or eight months last past, will you state whether the real estate market, particularly in respect of industrial properties, is active or otherwise?

A. Well, very inactive.

Q. You have some connection, I believe, with what I will call sick companies, outside of this National Radiator Corporation?

A. Yes.

Q. Will you tell the Court about that?

Mr. Royall: I object to that. I don't know that his impressions about sick companies generally are of any materiality.

The Court: It is on the question of qualification.

Mr. Teall: That is all. It is just qualification.

A. I am on the reorganization committee for the Wickwire-Spencer Steel Company, and I am a member of bank-
[fol. 337] ers' committees for Brockway Motor Truck Company, for Pearce, Butler & Pearce, manufacturers of boilers and radiators, and Richardson & Boynton, a boiler manufacturer and jobber of radiators.

Q. Have you given any consideration to the advisability or nonadvisability of endeavoring to convert the assets and properties of National Radiator Corporation into cash?

A. Yes.

Q. Have you come to any conclusions on that subject?

A. Yes.

Q. What?

A. I would endeavor to continue the company as a going concern, and not try to sell its assets for cash.

Q. Why not?

A. Some of them are not salable.

Q. What ones are not salable?

A. The plants.

Q. Do you think those would be salable at all?

A. I don't think you could get a bit on any of them now. I might say for the three largest manufacturers in the industry, who have operated thirty-one plants, they are operating six now. And the only radiator and boiler plant that has been sold since 1928 was the Utica Heating Corporation plant, sold by the National Radiator Corporation to Richardson Boynton, and that is not paid for yet.

Mr. Royall:

Q. Are you in position to state of your own knowledge that is the only one that has been sold?

[fol. 338] A. I haven't heard of another one, and I am sure I would, if one had been sold.

Mr. Teall:

Q. You know that there are six in operation at the present time out of thirty-one?

A. Out of thirty-one.

Q. Now, in an endeavor of a company going out of business to liquidate its inventory, what would you expect?

A. Well, the minute a company endeavored to liquidate its inventory, the trade understanding it is going out of business, its entire inventory would immediately be classed as obsolete. No one would want to buy it, for the reason, a steam fitter bidding on a contract on a house, and was including one of these boilers, his competitor would call attention to that fact, tell the owner about it, and the owner doesn't want to buy a boiler when he can't buy a repair part for it afterwards. Consequently the obsolete product is very difficult to sell at any price by a going concern, and in my opinion it would be very much more difficult to sell at a panic price by a concern that was going out of business. I might add, I bought a house ten years ago in Buffalo that is fifty years old, with a obsolete boiler in it, the boiler wasn't being manufactured; I had to replace a few grate bars, I couldn't buy them, I found I would have to pay such a high price to have them made, I preferred to buy a new boiler and take the obsolete boiler out. That is just an illustration of the situation.

Q. Would you expect any substantial amount of time to [fol. 339] be required in converting the inventory of a defunct concern into cash?

A. I don't quite get that question.

Q. Would you expect a substantial amount of time to be required in converting the inventory of a defunct concern into cash?

A. Yes; the volume of business is extremely small in the industry now. The producing capacity is extremely large, and if I were given a job to sell a nine million foot and twelve million pound radiator and boiler inventory for a concern that was known to be out of business, I would start by offering it at half price, and then I would offer it down about five per cent every month or two until I got it sold, and I would expect to have to scrap the last twenty or twenty-five per cent of the product.

Q. And of course there would be an expense in connection with marketing these goods?

A. I think you would have to maintain at least half the selling organization. I might say that in the American Radiator Company, when we changed patterns in 1926, we scrapped about a million feet of radiation finally, and we were a going concern.

Q. In your opinion, would the value and collectibility of accounts receivable be affected if the concern should go out of business?

A. Yes. When the National Radiator Corporation was organized, from the inherited accounts of the six companies from which it was organized, it carried over into 1928 a loss of accounts of those inherited accounts, which I recall was something over three hundred thousand dollars, which largely accounted for the bad showing of the company in [fol. 340] 1928. You see, I came in in 1928, so I know that.

Q. The accounts receivable on the books of this corporation at this time, you are familiar with them in a general way?

A. In a general way.

Q. With their amounts and character?

A. In a general way, not in detail.

Q. Have you an opinion as to how long it would take to exhaust the collection possibilities of those accounts, if the company was out of business?

A. It would take a long time.

Q. By "a long time" what do you mean—five years, ten years, one year, six months?

A. Well, I would think you would get a very large percentage of them in a couple of years. But I should think

it would take two years to get any percentage—ninety per cent, for example.

Q. Would you expect it to take longer or not so long to collect them, after the concern was defunct, as when it was operating in the usual way?

A. Well, a steam fitter would pay the company he was doing business with first, and the company that had gone out of business last. I am sure of that. So I think it is perfectly evident it would take much longer.

Q. Did you make any effort to dispose of any of the plants of the National Radiator Corporation prior to this receivership?

A. Yes.

Q. What plants?

A. I let a good friend of mine know in Buffalo—he was [fol. 341] the leading real estate man—that we had a plant we would like to dispose of, and if he knew of anyone who was in the market for any kind of a plant, to let me know. Off and on, for the past year I have said that to him, and he hasn't had any—I don't think a plant has been sold in Buffalo in 1931. I might say that we have in our real estate company in the bank a number of factory properties that have been vacated, we have not been able to obtain any bids at all for them at any price in the last six to eight months.

Q. You are familiar, I suppose, with the figures in the receivers' inventory and with the general financial situation of the National Radiator Corporation at the present time?

A. Yes.

Q. Have you an opinion as to the present liquidating value, if any, of the entire assets of this corporation?

A. Yes.

Mr. Royall: I object to such an opinion. I think it is highly improper for him to give an opinion at all, because I think he is not an expert qualified to do it, and if he is going to give one, I think he should be required to make it up at least by some itemization. I don't think it is proper for anybody to wave his hand here and give a figure like that.

The Court: I will overrule the objection at this time. You can, of course, bring it out on cross examination. I note you an exception.

[fol. 342] Q. What is the figure you have in mind, Mr. Flershem?

A. One hundred per cent, of course, for cash items.

Q. When you say "cash items" you include cash and the Government bonds of the company?

A. Yes.

Mr. Royall:

Q. I suppose you include the life insurance there too, don't you?

A. I am putting that on extra at one hundred per cent, under miscellaneous items. Cash and Government bonds at one hundred per cent. I put receivables at fifty per cent; regular accounts at forty per cent, and National Protective Association accounts at ninety per cent, making an average of about fifty per cent for the receivables. I put inventory at thirty per cent, twenty per cent to be scrapped at one-fifth of cost, balance eighty per cent to be sold at one-third of cost; fifty per cent from the selling price is about sixty per cent of cost. That would give a total return from the inventory figures of thirty per cent. Now, add to those figures one hundred per cent for the cash surrender value of the life insurance, for the special deposit under the New York State insurance law, $17,000, and for the other investment item, $12,000; total of $48,000. That would give me——

Q. You speak of another investment item. May I ask what you mean?

A. From investment, Semi-Public, book value $99,000.

Q. Are you reading from the inventory?

[fol. 343] A. No, I am reading from a review made by Mr. Cornell of our reorganization committee.

Q. You have $99,000 for what?

A. From investment, semi-public, book value $99,000. I am taking Mr. Cornell's figure there at $12,000. In that manner I arrive at the following valuation: Cash, one hundred per cent, approximately $1,800,000; receivables; fifty per cent, $425,000, as of December 31; inventory, thirty per cent, $480,000—$1,600,000 for inventory; that makes a total of $2,705,000. Add $48,000 for these miscellaneous items, gives $2,753,000. Now, the expense of liquidation I put down for two years about half the current expense, would make about $750,000. The net return would be $2,300,000.

Mr. Teall:

Q. The total net figure, then, representing your opinion of the liquidating value of the entire property is approximately $2,300,000?

A. Yes. Cash value under forced liquidation, immediate forced liquidation.

Q. $2,300,000?

A. $2,300,000.

Q. Do you have any financial interest in the National Radiator Corporation?

A. No; I have never had.

Q. How did you become connected with the concern?

A. Mr. Waters asked me to try and assist him.

Q. When you say Mr. Waters, which Mr. Waters do you refer to?

[fol. 344] A. Mr. John H. Waters. We had been competitors and friends for many years.

Cross-examination.

Mr. Royall:

Q. You left out of your summary the investment in the Steel Boiler Company. Do you know anything about the Steel Boiler Company? Did anybody tell you about that?

A. I know very little about that.

Q. You left that out wholly. You think that ought to go along kind of with the "tail of the dog" idea? Is that your idea about it?

A. Well, as I understand it, there is about as much owed there as there is equity.

Q. Owed to whom?

A. National Radiator Corporation.

Q. Don't you expect them to get that? Are you writing that account down too?

A. I don't see much value there. What can you sell that plant for for cash today, under forced liquidation?

Q. Well, in your opinion, should this $86,000 indebtedness of the Steel Boiler Company be written down fifty per cent, along with the other receivables, and the whole affair disposed of that way?

A. Yes.

Q. And the stock you consider worthless?

A. Well, you couldn't sell it.

Q. You consider it worthless, do you?

A. I don't think you could get any cash for it.

Q. Well, you said a moment ago you didn't know much about it?

[fol. 345] A. That is true; I don't know much about it.

Q. How much do you know about it?

A. I know they are making a few sales, not a large volume of sales.

Q. Do you know enough about it to give an opinion one way or the other to the Court?

A. I know they are making just a few sales.

Q. Did you hear Mr. Waters—Mr. Robert S. Waters—testify about that subject?

A. I heard most of it.

Q. Do you think he knows what he is talking about, or he didn't know what he is talking about?

A. I think he knows pretty well what he is talking about.

Q. Do you think he knew what he was talking about when he talked about that subject?

A. Why, yes.

Q. Do you think you know more about that subject than he does?

A. No.

Q. Are you willing to accept his opinion as superior to yours, as to the value of that item?

A. I didn't hear him say that you could sell it for anything.

Q. You wish to stand by your opinion that the most that you are willing to attribute to that, stock and loan together, is fifty per cent of the loan?

A. Yes.

Q. That is all you ascribe to that? You want to stick to that? All right, we will leave that. Now, as to the other accounts receivable, I understand that in your opinion they should be depreciated only to the extent of ninety per cent [fol. 346] of those that have this security under this—what do you call the plan?

A. National Protective Association.

Q. Yes—those you think are collectible, with a ten per cent discount?

A. I should think there would be—they are a two-name paper, that is counting it high.

Q. And the rest of the accounts receivable, you put those in at thirty?

A. Forty.

Q. And thus you get a general average of about fifty?

A. That is right.

Q. Have you heard it testified here that most of the accounts receivable, or the bulk of the accounts receivable of the Corporation have been already collected—indeed, that more has been collected—that more was collected during the months of October, November and December than the whole amount at which the customers' accounts receivable was carried less discount? Did you hear that?

A. Oh, that is by a going concern; that is very different from a forced liquidation.

Q. It was by the receivers, wasn't it?

A. Yes, but the receivers were carrying on a going business. It is generally anticipated in the trade that this concern is going to continue in business, no matter what has been told by anyone, competitors or anyone else.

Q. The trade has been doing business with the receivers, hasn't it?

A. Yes.

[fol. 347] Q. Isn't it an assumption, in the nature of things, that when a corporation would go so far down it is in the hands of receivers, that it may or may not go on?

A. Yes.

Q. And haven't you heard it testified to here in court today that the receivers—the receivers—have been able to collect within a period of less than three months from the date of the receivership an amount in excess of the customers' accounts at the date of the receivership?

A. Yes, Mr. Royall, but the receivers are manufacturing currently, and producing and selling, and advertising, and carrying on the affairs of the business almost exactly the same as the corporation did before the receivership. The trade observed that, and they considered it a going concern. It would be a very different thing if the receivership was ended and forced liquidation started—very different.

Q. Well, suppose, if you will, if the Court should authorize—and that is what I am going to ask the Court to do here—the receivers to continue the collection of these accounts receivable, not to turn them over but to collect them. Are you basing your testimony on some theory that because

the receivers may at some time during the process of collecting stop manufacturing, that there is any legal defense to the account? You are not trying to suggest that, I suppose?

A. If there is any legal defense?

Q. Yes.

A. I don't know just what you mean.

Q. You know what a legal defense is by a debtor and a creditor——

[fol. 348] The Court: Well, suppose we pass, that there is no legal defense to it.

A. I know this, Mr. Royall: That if the Court orders this to be liquidated, the trade will know it, and the competitors will know it, and it will be generally known throughout the country in a week, unless it is to be a forced liquidation proposition immediately; and most of the debtors will delay their payments and amass claims against their accounts, cancelling them in large part—and all those things that you know as well as I do.

Q. Notwithstanding, you think that in cases where we get two names for each account, as debtors on each account, that we can collect ninety per cent, whereas, if we only have one name, we can only collect forty per cent?

A. Very much higher percentage—very much higher.

Q. I am glad to have your ideas on that. Now, your inventory, you put that in at a straight thirty per cent?

A. That is right.

Q. Don't you know that the receivers have, notwithstanding that they are receivers—and you have heard testified here, they have sold a large part of the inventory at prices very subtsantially above inventory prices?

A. The National Radiator Corporation in receivership is regarded as a going concern, its product is not regarded as obsolete. The minute it is ordered to liquidate its assets, all of its product immediately becomes obsolete and drops [fol. 349] fifty pre cent in value at once, the same as a used automobile.

Q. Now, let us see what you mean by "at once"?

A. Inside of a week.

Q. Let us suppose that the receivers decided that they were not going to go ahead any further. Wouldn't it be their duty to go forward and make sales, the best way they could?

A. Yes, but they couldn't conceal the fact that they were liquidating the company, the competitors wouldn't let them.

Q. Why can't they conceal the fact? Why can't they?

A. Immediately it will be known that the plants are all shut down. Your competitors will know it the very next day. Their salesmen will spread the news at once.

Q. Our plants are practically all shut down here, comparatively speaking. We are running along in a crippled sort of fashion—enough for our competitors to make it the basis of a rumor. Couldn't they do it?

A. No, they know two plants are operating. They know one is operating five days a week and the other one three days a week.

Q. If a competitor wanted to go around suggesting that the receivers are not going to carry on, isn't he in just as good a position to do so now, because in the meantime the receivers decided not to go ahead?

A. No, that is not the truth now, and it would be then. You can't keep the proceedings in this court-room secret. These proceedings are being followed by competitors, they [fol. 350] will know tomorrow what occurred here today.

Q. Now then, consider this possibility—and here is something I would like to have you answer me, very much, because I think you are qualified probably to do it: You don't think it advantageous, I suppose, to the newly reorganized committee that your committee proposes to bring into existence to be carrying a lot of idle plants, or do you think it advantageous?

A. No.

Q. Do you think you would be better off to have the plants, or not to have the idle plants?

A. Why, that is a pretty hard question to answer. If there is an upturn in the business sufficient to warrant using them, it would be advantageous to keep them, for the next couple of years; but my judgment would be they could take a chance on selling some of them, not all of them. I wouldn't think that was good judgment.

Q. You think it would be advantageous to anyone conducting this business to have the plants; at least pretty near all of them?

A. Have some of them?

Q. Most of them?

A. No, not most of them. I think I would sell three or four of them, if I could.

Q. Well, you would keep some of the idle ones and sell some of the idle ones—put it that way, shall we?

A. Yes.

Q. Now, the reorganization committee are not the only people that could make use of some of this property, are they?

[fol. 351] A. They can't make use of this property now. I am looking ahead in the future a couple of years, or more.

Q. Let us suppose, Mr. Flershem, that the going plants, all of the accounts of customers, good will, trade name, patents, the stock of the Naitonal Radiator Corporation in the Steel Boiler Company—the equitable rights that the National Radiator Corporation may have in its position, to claim the position of the sole owner of that company, of the stock of that company—do you think that that going business, consisting of, say, two plants, at New Castle and Johnstown, and an office building at Johnstown, and the warehouses, this good will in a going business, plus this business of the Steel Boiler Company, do you think that will make money?

A. Do I think what?

Q. That it would make money? Comb it down to that, do you think that affair would make money?

A. Do you mean all of the property?

Q. Just that property I talked to you about—throw everything out, take everything out of the picture except the two best plants, Johnstown and New Castle, the office building that they use at Johnstown as the headquarters of business, the warehouses, of course put the going business in, the good will in, and the ownership—regarding it as a hundred per cent ownership of the Steel Boiler Company—would that, as a nucleus of a business, in your opinion, make money?

A. At some time, I think.

Q. Make money now?

[fol. 352] A. No.

Q. Have you seen the receivers' report that they filed here?

A. No.

Q. Would it surprise you to hear that the receivers' report showed earnings——

Mr. Teall: It doesn't show any earnings, unless I very much disremember it.

Mr. Royall: All right; it shows earnings before the expense of carrying these plants. I thought perhaps you could point to it quicker than I could.

Mr. Teall: It shows more cash receipts than disbursements, but it shows a loss after taking the expense of operations.

Mr. Royall: Well, I will read what it says——

The Court: All right, it is part of your cross examination, you may read it to the witness.

Q. Are you familiar in the statement of the report of the receivers dated (blank), which reads as follows——

Mr. Royall: Do you know about the date, Mr. Teall?

Mr. Teall: I think it was filed in this court on the second day of January, 1932.

[fol. 353] Q. "On the accrual basis of accounting, without deduction for depreciation and without payment of interest on the funded indebtedness of the said corporation, the operations of said receivers for the period October 9, 1931, to November 30, 1931, resulted in a loss of $14,630.44"——

A. What were those dates?

Q. That was for the period from October 9 to November 30, a little less than two months.

Mr. Teall: Without depreciation.

Q. (Continuing:) —"but during said period your receivers carried an expense of $46,548.21 for the maintenance of the above mentioned non-operating plants, which expense has been charged in competing said figure $14,630.44." That was the loss. So that you will say that there was for that short period of time, before the expense of carrying these plants, there was about $32,000 of operating revenue before depreciation——

A. Not surprising at all.

Q. Before interest?

A. I will tell you why that is not surprising, Mr. Royall. Those are the thirty best earning days in the entire year

for the radiator and boiler industry, which is highly seasonable. The average shipments and deliveries during each month throughout the year, for something like nineteen years, is approximately as follows: January, 5 per cent; February, 4 per cent; March, 4 per cent; April, 4 per cent; May, 5 per cent; June, about 7 per cent; July, about 8 per [fol. 354] cent; August, 9 or 10 per cent; September, 12 per cent; October, 16 per cent; November, 12 per cent; December, 10 per cent—I think that is about a hundred. It sounds to me like about 150, but maybe it isn't. Let's add that up and see what it is—99. Now, if you had a report of the earnings of February, March or April, you would find a big loss—in fact, in the best earning years——

Q. Now, I would like to take that up.

A. I hadn't quite finished answering. I might state this to you: In its best earning years the American Radiator Company seldom made a profit on the first six months of any year; forty per cent of the volume of business is done in the first six months, and sixty per cent in the last six months.

Q. Are you considering you are answering a question of mine, or are you volunteering?

A. I am giving you some information. I thought it would be illuminating to account for those earnings.

Q. Suppose I put questions, and we will go along, I think it will help the Court. Do you know whether the receivership—or the corporation, ever lost money in this February month that you speak about?

A. Well, the only February month he has had is the one just past.

Q. Yes.

A. I don't know; I feel sure it did.

Q. You think it did?

A. Yes.

Q. Now, do you know anything about the patents of the company?

A. I have had some experience with patents.

[fol. 355] Q. I asked you if you know anything about the patents of this company.

A. I have no knowledge that is worth anything, about the patents of the company, no.

Q. Have they any designs of radiators that are peculiar to themselves?

A. Yes; the designs of every company are peculiar to themselves.

Q. Do you consider the product, the designs of the National Radiator Corporation compare favorably with those of their competitors?

A. Yes, very good product.

Q. Are any of those designs exclusive, by way of patent or other method of legal exclusiveness, if I may use the expression?

A. I never heard of any exclusiveness of design in the building. There are patents galore. I never heard them amount to anything.

Q. What trade names do they use?

A. The National Radiator Corporation uses the trade name "Aero" for its radiators, and "National" for its boilers.

Q. Have they been accustomed in the past to do any advertising?

A. Some, not much.

Q. Do you know to what extent?

A. Oh, about twenty-five to fifty thousand dollars a year, recently, which is very small.

Q. What do you mean by "recently"?

A. In the last two or three years.

Q. Before that did they advertise more broadly?

A. Yes—not before this corporation was formed?

[fol. 356] Q. No, before the last two years that you are testifying about.

A. In 1928 or '9 they advertised somewhat more than that, spent somewhat more, I think about $100,000, as I recall it.

Q. And in 1928 perhaps even more?

A. 1928 is the year I mean.

Q. 1929 then?

A. Not quite so much.

Q. They were accustomed, before the present active depression, to spend a hundred thousand dollars a year for advertising?

A. When was that?

Q. Before this present depression set in.

A. I only know what they spent in 1928 and 1929. I don't know what they spent before that.

Q. Would you say that they spent well over a hundred thousand dollars?

A. Not well over, my recollection is about $100,000 in 1928, and less in 1929, and much less in 1930, and very little last year.

Q. Do you know anything about customs for setting up reserves by properly managed industries—reserves, I mean, against accounts receivable and notes receivable?

A. Yes.

Q. Did you hear that the reserve amounted to about twelve per cent against these customers' receivables?

A. Yes.

Q. And that that included in there about $300,000 worth—let's see—about $200,000 of these Protective Payment receivables?

[fol. 357] A. Yes.

Q. Isn't that a hig[illegible]eserve against receivables?

A. Well, these times are the worst conditions in collections that I ever knew——

Q. I am asking as a matter of general practice.

A. General practice, it is high.

Q. General practice, in normal times?

A. Oh, yes, general practice in normal times, it is high.

Q. Three per cent would be about usual, wouldn't it?

A. I would think it would be somewhat more than that. I would think five per cent in normal times.

Q. As applied to accounts characterized as not stale, wouldn't you think three per cent was about the proper figure?

A. Well, if you call 1927, '7 and '8 normal times. I think three per cent would be enough. That has nothing to do with these times.

Q. Well, hasn't that been regarded as good accounting practice.

A. It would have been good accounting practice in those years, yes. It was in this business.

Q. Well, it has been a habit? It has been established as good accounting practice for years?

A. Yes, in those years.

Q. And for many years before it was the accustomed accounting practice?

A. Yes, but not for this year, Mr. Royall.

Q. Well, special reserves should go up then, I suppose, but they should be treated as special reserves?

[fol. 358] A. Well, this year I think you must have reserves of that kind, without any reference to former practice, because conditions—we have never seen the like.

Q. Now, the building business has been slowing up for quite a long while?

A. Since the end of 1928.

Q. We have accumulated during the period since the end of 1928 a deficit, if I may use that term to describe it, of building, we have run behind?

A. I don't know. We have got a surplus of buildings, I do know, under present conditions, a surplus of houses, a surplus of factories, a surplus of apartment buildings, surplus of stores, lofts, office buildings, everything—the surplus is very heavy. Let us get to normal times, and we might not have a surplus, we might have a shortage, I don't know.

Redirect examination.

Mr. Teall:

Q. Just one question, Mr. Flershem. You are a member of the reorganization committee, I believe you so testified?

A. Yes.

Q. Do you know what percentage of bonds have come into the reorganization plan and signified their assent thereto by depositing bonds?

A. Better than ninety-five per cent.

[fol. 359] ROBERT S. WATERS RESUMED

ROBERT S. WATERS resumes the stand.

Cross-examination (continued):

Mr. Royall:

Q. Now, what did you say when you testified on direct examination your opinion was as to the write down—as the figure for the receivables ought to be written down to?

A. I testified that the receivables should be written down to about $174,000.

Q. $174,000?

A. In the neighborhood of that.

Q. And those receivables at their face after a twelve per cent reserve for doubtful and bad accounts would be what?

A. Receivables as of the end of the year, or the first of the year, were $858,000.

Q. And you say that that ought to be written down to $174,000?

A. Around $174,000.

Q. But the eight hundred thousand dollars that you were carrying on that was after a reserve for doubtful and bad, of about twelve per cent?

A. As I recall it, yes.

Q. And included in this $800,000 was this $86,000 due from this company, Steel Boiler Company?

A. Yes.

Q. So that, after you take out the $86,000 that is due by the Steel Boiler Company from your $176,000 you have got about $90,000 left?

A. Why are you deducting that?

[fol. 360] Q. Well, don't you think it is payable?

A. I don't know how you would get the money.

Q. You don't know how the receivers would get it?

A. That would mean, we would have to sell the property to get it. That property was on the market for two years before the Corporation bought it. That is the Lebanon plant. We would have a very difficult time now to sell it, I am convinced of that.

Q. But you have got these patents, haven't you?

A. That doesn't matter. We haven't gotten the patents yet, we have merely applied for them. We may never get them.

Q. What do you think would happen if the receivers put up this stock and accounts, lock, stock and barrel—and they could put it up lock, stock and barrel—of the Steel Boiler Company? Do you think your competitors would be interested in buying them?

A. No.

Q. Well, you don't think so much of it now, then? You don't think it is such a good thing?

A. I don't think they would want to buy the plant.

Q. Would they want to buy the business—the process? Would they want to buy the steel boiler business?

A. No; they have their own boiler business. And if the patent isn't granted on these few devices that go into the boiler, they could turn around and make them themselves without them, absolutely.

Q. If you were told that your father, Mr. John H. Waters, in attempting to persuade the depositors of these [fol. 361] bonds, stated that he believed—that he was sanguine of the prospect of turning these deficits into profits, because of his belief in the steel boilers that they were manufacturing, would you concur in such a sanguine thought?

A. I wouldn't concur in the thought that steel boilers alone were going to pull this company out of the hole. It would take more than a steel boiler. And I don't think Mr. John H. Waters ever stated that.

Q. Well, what do you think can pull it out of the hole?

A. Revival in business, or increase in the demand for the manufacture of the product.

Q. Are there any improvements in the style of the product that you are sanguine in believing will pull you out of the hole?

A. I think this, Mr. Royall: Any improvements in product, whether it is in the manufacture or design, or whether it is improvement in design and type, will all contribute in bringing about an improvement in our situation.

Q. Well, from time to time——

A. That is going on constantly, yes.

Q. That is, normal improvements. But have you in mind now any special improvements—phrase it, a departure; that conveys my meaning, perhaps—not ordinary routine improvements here and there, but new ideas and new departures, which you and your father are sanguine of, that they will pull you out of the red?

A. Nothing new, no. I don't think there is any one of a number of new things we are developing and bringing onto [fol. 362] the market in itself will pull the corporation out. I think they will all contribute.

Q. The best thing in sight from that standpoint is the steel boiler, isn't it?

A. Oh, no. I don't think the steel boiler—I don't think you can contribute to any one particular thing—by "thing"

I mean product—the fact that it will pull the corporation out.

Q. Now, has it been the custom of the corporation in the past, when they developed new ideas of one kind or another, new inventions, whether patented or not—has it been the custom to have the corporation develop them and manufacture them, as well as sell them, and have it to be carried on as a regular corporation matter, or has it been the custom in those instances, rather, to put it into a corporation, those things owned by some of the employees or officers or directors? What has been your practice in that respect, generally?

A. The practice has been this: that the corporation develops a product, brings it out and manufactures it and endeavors to sell it.

Q. They do that for the account of the corporation, for the purposes of the corporation, and the benefit of the corporation?

A. Yes.

Q. Why was it, then, that this new departure, this steel boiler departure, was put into the name of the Steel Boiler Corporation and carried on by it, with only a bare majority of the stock in the National Radiator Corporation, and the rest of it in the employees? Why was that?

A. The original money advanced to acquire the plant was advanced by John H. Waters.

[fol. 363] Q. Well, there was plenty of money in the corporate treasury, wasn't there?

A. We felt at that time that it would be desirable to keep it separated from the corporation.

Q. And why?

A. Because we thought it was an undertaking that would require some development and some time to perfect and get into the business.

Q. That is the only reason you can give for that?

A. I think that will cover it, yes.

Q. How much money was there in the treasury of the corporation, cash, at the time the default was made on the coupons on this bond issue?

A. Something over a million dollars.

Q. Something over a million? Is that the best you can do?

A. I wouldn't undertake to quote from memory. I can look it up if you want me to.

Q. On February 1, 1931, you defaulted on your coupons then maturing on the then outstanding debentures which have been so often mentioned here. Is that right?

A. That is correct.

Q. On December 31st you had cash of $1,701,809.94, according to your balance sheet as of that date. Is that correct?

A. About correct, I imagine.

Q. Besides which you had $32,000 of Government bonds. Is that right?

A. If it is stated in the plan, it is substantially correct, yes. I am not attempting to remember those figures.

[fol. 364] Q. And the amount of interest then maturing was three hundred and some thousand dollars?

A. Three hundred and some thousand.

Q. Do you identify this paper I am showing you as the annual report of the corporation for the year ended December 31, 1930?

A. Yes.

Mr. Royall: I offer it in evidence, as Intervenor First National Bank of Cincinnati Exhibit No. 2.

Q. I call your attention to the fact that as at that date you carried assets on your books of $19,355,937.79. Is that right?

A. If it is on the report, yes.

Q. Now, what did you testify, again, that your receivables should be marked down from and to—from eight hundred thousand, was it, to a hundred seventy-four thousand?

A. About $850,000 to $174,000.

Q. And treating this account as collectible from the Steel Boiler Company, would you want the Court to understand that the rest of the eight hundred thousand is, in your opinion, only worth about $90,000. Is that what you want the Court to understand?

A. My opinion is this: That our accounts receivable and notes receivable, when collected, would amount to around $174,000.

Q. How much do you think you can collect outside of the $86,000 item due to you from the Steel Boiler Company?

A. How much could we collect other than that?

Q. Yes, from your regular customers. On the $800,000 [fol. 365] due from your regular customers, how much do you want the Court to understand that you think can be collected?

A. Probably in the neighborhood of $100,000.

Q. In the neighborhood of what?

A. Neighborhood of ninety-eight or a hundred thousand.

Q. In working that out, you have proceeded upon the theory, have you, that you can collect the whole of the $86,000 or less than the whole of the $86,000.

A. I am figuring this—that if you could find a buyer for the Lebanon plant, that is what you would get. If you cannot find a buyer for the Lebanon plant, I don't believe you can get your $86,000.

Q. Well, then, in arriving at this opinion, how have you treated it? How do you think the Court should treat it here? Do you think the Court should treat this whole asset in your steel boiler business as worth more or less than $86,000?

A. The business is worth more or less than $86,000?

Q. I am asking you whether, for the purposes of this upset price, you are bound here to advise the Court—about whether you want to tell the Court, in your opinion, whether your whole investment, stock and accounts receivable, in this Boiler Company should be treated at anything, and if so, at what amount?

A. Well, I would say this: It would be very difficult for the receivers to collect the money due the corporation by the Steel Boiler Company, unless we should be fortunate enough in finding a buyer for the property. Now, the Steel Boiler property, as such, will have very little market unless [fol. 366] you could be fortunate enough to find somebody who would take it over and continue to produce the boilers; but the Steel Boiler Company would be particularly handicapped, because it hasn't the sales organization, it is merely a manufacturing company.

Q. Now, as receiver, do you think that there is enough—I want you to talk now as receiver. Do you think that there is enough in this National Steel Boiler Company so that it ought to be made the subject of a separate sale, so that the National Radiator Company and some of your other competitors can come in here and have a chance to bid for this thing? Don't you think that that would be the safe way of protecting creditors, to have that done that way?

A. I haven't an opinion on that, I haven't given it any consideration, Mr. Royall.

Q. Now, then, I wonder if you have given this thought consideration: Do you understand what the duties of receivers are?

A. I think so, yes.

Q. Well, I would like to have you give a definition of what you consider the duties of a receiver to be?

Mr. Teall: If the Court please, I am going to introduce my first objection today.

The Court: Yes, I think we are going too far afield.

Q. Assuming, Mr. Waters, that the Bondholders' Protective Committee were to purchase the going business of de- [fol. 367] fendant when and as the same is offered for sale, under order of court, in your opinion, would you be better off to take all of the properties or less than all of the properties?

A. My opinion would be this, Mr. Royall: At this time the reorganization committee would be better not to have all the property. That is based on the unfavorable immediate outlook of business. If, however, there should be an upturn in business, we might be very glad to have the plants at that time, provided that occurred within a year or eighteen months. We might be very glad to have it. That is something I don't know. I don't know what is going to happen. If business is going to remain as it is now, we wouldn't need all the plants. That is very evident from what I have told you regarding the production.

Q. Well, would you say this: Is the whole property, in fact, in your opinion, essential to the business?

A. Not under present business conditions, no.

Q. Or any that you anticipate within any reasonable time?

A. As I see the situation now, we will not have occasion to use the plants for some time.

Redirect examination.

Mr. Teall:

Q. Mr. Waters, you have been examined by Mr. Royall in regard to the appraisal made at the end of '26, or as of

December 31, 1926, by Sanderson & Porter. Do you have that appraisal before you?

A. I do.

[fol. 368] Q. Will you open it at page 2? At the top of the page, state the basis of the valuation made in that report, as that basis is stated in the report itself?

A. The best way to do so would be to read the report, Mr. Teall, that portion of it.

Q. Well, read the second sentence.

A. "We summarize below our estimates of replacement costs now, and also less allowances for depreciation of the fixed assets of these companies as of December 31, 1926."

Q. In other words, that is a report on the basis of replacement value less depreciation?

A. It is.

Q. Now, I ask you to turn to page 6 of the appraisal and read into the record the first sentence of the second complete paragraph on that page.

A. The second complete paragraph?

Q. Yes. The first sentence of the second complete paragraph on that page.

A. "Our estimates of replacement costs now of the buildings are based upon current construction costs."

Q. And that report was made in '27?

A. This report was made and accompanied a letter of Sanderson & Porter dated July 26, 1927.

Q. I don't want to take that much time—the report was made in the summer of 1927, as of December 31, 1926?

A. Yes.

Q. Now, I ask you to read the first sentence of the last paragraph on page 8.

A. "Our estimates are based upon advantageous use of [fol. 369] plant facilities under capable management in the conduct of the business of the respective companies, and are not estimates of liquidating value."

Q. Will you state the amount of the unpaid indebtedness of National Radiator Corporation at the close of business October 8, 1931, exclusive of the outstanding debentures?

A. $157,511.89.

Q. 511—or 811?

A. 511, according to my memorandum.

Q. $157,511.89?

A. Yes.

Q. Do you know the amount of cash and Government bonds and life insurance surrender value that you had on hand on March 2, 1932?

A. Yes.

Q. What is it?

A. As follows: Cash $759,119, U. S. certificates of deposit and bank certificates of deposit $1,030,875; cash surrender value life insurance at that time was $22,900; total $1,812,894.

(Adjourned until Monday, March 7, 1932, at 10:00 o'clock A. M.)

[fol. 370] Monday, March 7, 1932.

Morning Session

TESTIMONY OF JOHN H. WATERS

JOHN H. WATERS, a witness produced on behalf of complainants, having been duly sworn, testified as follows:

Direct examination.

Mr. Teall:

Q. Mr. Waters, you reside at Johnstown, Pennsylvania?

A. Yes, sir.

Q. And have resided there for how long?

A. For fifty-nine years.

Q. You are familiar with the organization of National Radiator Corporation in 1927?

A. I am.

Q. What has been your connection with that corporation?

A. At the time of the sale of the National Radiator Company to the National Radiator Corporation, it was my intention to retire entirely, but I was induced to remain on as Chairman of the Board for a period of one year to one year and a half. Mr. Edward Norris was elected to the office of president. He became ill, and the company was really—he eventually resigned after serving about six months, and following that for a period of about four or five months I temporarily acted as president until a new president was elected. That was Mr.—I can't think of his

name, the president; he served from September, '28, until [fol. 371] February 1, 1929. Since that time I have been acting as president.

Q. So that you were chairman of the board from when to when, at the beginning?

A. From the organization of the corporation, in August—the latter part of August or September, I believe, until—really, I have served as chairman since that time. Mr. Pierce is the man that followed, whose name I couldn't recall.

Q. I will change the word from "president." You were the active executive head from the beginning, from when to when?

A. Of this corporation?

Q. Yes.

A. I would hardly say I was the active head. I consented to serve as chairman of the board for a year to a year and a half, conditional that an active president would be secured. As I say, Mr. Norris was elected, and he became ill and resigned after six months. Temporarily then I acted as president until the following September, when Mr. Pierce was elected president and in active charge of the company's affairs. He resigned, however, after serving about a year and a half, in February, 1930. Since then I have been acting as president.

Q. And Mr. Flershem, I believe, is now chairman of the executive committee?

A. He is.

Q. How long has he been in that office?

A. He has filled that position, I believe, since September, 1928.

Q. Now, since the organization of this company, have you been under salary?

[fol. 372] A. I have drawn no salary whatever.

Q. What experience have you had in the radiator and boiler business?

A. I originally engaged in the radiator business—we were not manufacturing boilers at that time—in 1893; and, as I stated, I was actively engaged at the head of the old National Radiator Company up until the time the company sold out to the National Boiler & Radiator Corporation. I was the active head of that organization until that period.

Q. From 1893 until 1927?

A. Yes.

Q. You are a member of the Reorganization Committee, the complainants in this case?

A. Yes, sir.

Q. How came it that the Reorganization Committee was organized?

A. Well, due to the full knowledge of the affairs of the company of myself and Mr. Flershem, we realized that under the original capitalization it would not be possible to carry the organization to a safe conclusion, and we then went to the bankers in New York, Bankers Trust Company and Seligman & Company, the two factors in the consolidation of these six different companies, and suggested a reorganization with a reduced capitalization.

Q. With a view to preserving——

A. With a view of preserving the interests of the company. Personally I could have very well dropped out entirely and taken my loss, but I realized that there were a great many people who had invested in the securities of the company, and I felt that I would like, if possible, to help [fol. 373] conserve their interests as well as my own, and for that reason I worked during all this period without any salary.

Q. Mr. Waters, have you given any thought to the advisability or non-advisibility of turning all the assets of this company into money, if possible to do so, as distinguished from continuing the organization as a going concern?

A. Yes, I have given a great deal of thought to that.

Q. Have you come to any conclusion as to what ought to be done?

A. Well, my conclusion has been that it would be very unwise to attempt to liquidate the company at this time.

Q. Why?

A. Well, for the reason that our inventories would be virtually scrapped. It would be impossible to sell the plants and equipment at this time, for the reason that the industry today has capacity or practically double the amount of radiation and boilers that were sold during the period of 1928, which was the peak period in the industry, and of course the plants are not adapted to any other line of manufacture; and we have made effort to sell the plants that are not being operated, but without any results whatever as to securing purchasers. It would be a tremendous sacrifice to sell our inventories at this time, because as soon

as it would be announced that the company was going out of business our products would be obsolete and would have to be sold at a very great sacrifice, and our accounts receivable, of course, would suffer tremendously as well.

[fol. 374] Q. Do you have on your radiators and boilers the words "National Radiator Corporation," or anything else to indicate who manufactures the goods?

A. We have distinguishing marks on them, yes.

Q. And what is the nature of that mark? Is it just a label that would come off, or is it in the casting, or how?

A. No, it is in the casting.

Q. Has the National Radiator Corporation any funded debt other than the 6½ per cent debentures that have been mentioned here?

A. Not any.

Q. What amount of those debentures are held by you, or you and your family?

A. Individually and my family, we hold around a million and a half—in excess of a million and a half of those debentures.

Q. Do you know how the rest of those debentures are held?

A. They are quite widely scattered. They are held pretty well all over the United States, and some in Canada, and we have discovered a few of them were held in Europe.

Q. In other words, it would be fair to say that you and your family hold about a million and a half, and the balance are held by the public generally?

A. By the public generally or people who were identified with the corporation, people who were employees.

Q. What percentage of these debentures—give your answer in dollars—have been deposited with the Reorganization Committee, of which you are a member?

[fol. 375] A. Ten million and some odd thousand. It is in excess of 95½ per cent, I think, now, and they are still coming in, still being deposited.

Cross-examination.

Mr. Watts:

Q. Mr. Waters, if the properties that were formerly in the so-called National Radiator Company were now be continued as an operating company, could such an operat-

ing unit dispose of your present inventory at fairly advantageous prices?

A. Not as a liquidation proposition.

Q. I am not speaking as a liquidation proposition; I am speaking as a continuing operating unit.

A. Well, I don't quite understand that. If we were continuing as an operating unit, we would be continuing as a company, and they would not be liquidating then. You asked the question concerning liquidating, I believe.

Q. No; I am asking you to assume you were to continue, and in the continuation you have just those properties which were formerly owned by the National Radiator Company. Could you not dispose of your present inventory at advantageous prices?

A. Well, may I ask you just what you mean? Do you mean to continue to manufacture and supply new product, or where sales would be made?

Q. Yes, sir.

A. Oh, I presume I could, in due course, like we are hoping there is going to be a return to better business conditions, and that could be done eventually.

Q. And I ask you whether or not, if you continued in that [fol. 376] manner, that is to say, using substantially the old National Radiator Company plant and organization, you would necessarily have to make use of the four, five or six other plants which were merged with the National Radiator Company in 1927?

A. Not all of them, no.

Q. Well, would you have to use any of them?

A. That would depend altogether on business conditions. If business improved and warranted, some of them could be used, no doubt; but under existing conditions, not, because we are not operating the plants of the old National Company to anything near like their capacity. In fact, one is closed down entirely, the largest plant for the manufacture of radiators. The plant at New Castle, which manufactures boilers, is today working at about forty per cent capacity, and I don't have the records, but I think Johnstown plant, as a radiator plant, is working at about the same capacity.

Q. And could not all the patents, trade names and copyrights which are listed in your present assets be used and exploited by a new company that would have practically the assets of the old National Radiator Company?

A. Well, they could be used as to whatever they would be worth, yes. We have a number of patents, like all manufacturers have, and have some applications for patents pending. As to the real value of them, that is problematical.

Q. When Mr. Robert Waters was on the stand last week, he was asked to state the price paid by the present corporation for the assets of the old National Radiator Company, [fol. 377] and stated that he was unable to do so but would give us that information. Are you able to answer that question?

A. I couldn't give it offhand. Our proposition was to sell our company for cash. We, however, accepted some securities, which we could have received cash for, and a considerable amount of common stock. I can't tell you the exact amount, but the securities and cash are in excess of $13,000,000.

Mr. Teall:

Q. That is, taking the securities at par or market?

A. At par; and common stock at around $36—$37 a share, which of course has no value today.

Mr. Watts:

Q. And can you state the amount of that common stock in relation to the amount of these debentures, if any, that were taken?

A. I am unable to state that correctly. I didn't suspect any such question would be asked and don't have the data before me.

Q. Now, Mr. Robert Waters was also asked to state the total extent of the financing furnished by your present company to the Steel Boiler Company, and stated that he would give us that information later. Can you help us now while you are on the stand?

A. I can't give you that definitely. It is my recollection that at the organization of the company it was capitalized at $150,000, and there was paid in in cash, I believe, between $50,000 and $60,000 at the time of the organi- [fol. 378] zation. Of that amount I and some of the associates in the company subscribed for—oh, I think around $30,000; it was just a little bit less than the amount that was put in by the company, we thought being that the company should be in control. At that time we questioned

the advisability of drawing on the resources of the company, and felt that as individuals we should help as far as possible to establish that plant. And our reason for doing that—that question was asked before, but not as clearly stated as it should have been—was due to the fact that a great many large buildings, hotels, schoolhouses and institutions requiring large installations required larger boilers than the units that are made in cast iron, with the result that in many cases we would lose the radiation, because we didn't have the boilers, and for that reason we thought it was advisable to go into the manufacture of steel boilers, so that we could supply the requirements of these large installations and secure the order for the radiation as well as for the boiler.

Q. Is it correct that the defendant corporation, meaning the corporation in receivership, paid the bills of the Steel Boiler Company, and that the steel boilers which were manufactured by the latter were then consigned to the former, which did the selling?

A. In effect, that was the way. They advanced—the National Radiator Corporation would advance sufficient funds to pay for the material and the labor, and then the Steel Boiler Company, in turn, consigned the boilers to the National Boiler & Radiator Corporation.

[fol. 379] TESTIMONY OF WILLIAM G. HEINER

WILLIAM G. HEINER, a witness produced on behalf of the complainants, having been duly sworn, testified as follows:

Direct examination.

Mr. Teall:

Q. Mr. Heiner, you reside at Pittsburgh?

A. I do.

Q. And you are a member of the Allegheny County Bar and of the Bar of this Court?

A. Yes.

Q. And have been for how long?

A. Fourteen years.

Q. You are one of the two receivers of the National Radiator Corporation?

A. Yes, sir.

Q. Having been qualified as such on what date?

A. We were appointed October 9th; I think our qualification by filing the bond was the next day after, October 10, 1931.

Q. I think it was October 9th, but it doesn't make any difference. It was October 9, 1931.

A. That is right.

Q. Had you had any previous experience, Mr. Heiner, in the radiator and boiler business?

A. None whatever.

Q. You had, however, had some experience as receiver and as attorney for receivers?

A. Yes.

Q. That was in your practice as a lawyer?

A. That is right.

[fol. 380] Q. Can you give us some notion of what experience you had had?

Mr. Watts: Is that relevant and competent?

Mr. Teall: Do you object to it?

Mr. Watts: Why not ask the question? If there is any question about his qualification, I will raise it.

Q. How many employees do the receivers have? I don't expect you to give an exact answer, but approximately.

A. I should say at the present time, between six and seven hundred, all of the various kinds.

Q. Your connection with this business since you have been appointed has been close or otherwise?

A. I think it has been rather close.

Q. Can you give the Court some notion of the close touch you have kept with this business since you have been appointed receiver?

A. Except for the last week or so, when we have been engaged in this court matter, I have been in Johnstown practically every Monday, Wednesday and Friday, and then on the alternate days of Tuesday, Thursday and Saturday, I have done considerable work in my office in Pittsburgh, and in conferences with our attorneys in Pittsburgh.

Q. You have been in my office many times during the receivership?

A. A great many times, yes, sir.

Q. Now, Mr. Heiner, in your connection with this busi-
[fol. 381] ness, have you formed any opinion as to the advisability—from the standpoint of the benefit to creditors, the advisability of continuing the business as a going concern, or of trying to turn it into cash?

A. Yes, I have formed an opinion.

Q. What is your opinion?

A. Well, if this company can be continued in reorganization rather than liquidated, I think that the creditors in due time will fare a great deal better than to receive a cash distribution and liquidation.

Q. Have you formed an opinion as to the amount that the business might be liquidated for at this time—assuming that it could be liquidated and turned into cash?

A. Yes.

Q. What in your opinion is the figure?

Mr. Watts: I am somewhat curious, if the Court please, as to whether counsel is offering this testimony for the purpose of assisting the Court in fixing an upset price or not.

Mr. Teall: That is the purpose of it.

Mr. Watts: Very well.

A. $2,229,073.98.

Q. Well, that seems fairly close, but tell us, if you will, how you arrive at that figure?

A. We have on hand now—well, no, I will take that back. I figured this as of our balance sheet of December 31, 1931, which shows cash of $852,096.29, and I figure, of course, [fol. 382] that we will get one hundred per cent for that. In investments we have United States certificates of indebtedness of $980,000, accrued interest on those certificates of $6,124.97, bank certificates of deposit of $50,000, cash surrender value of life insurance of $22,900, and deposits under the New York Workmen's Compensation Law of $18,686.33, making total investments of $1,077,711.30, which I figure we will get one hundred per cent for. Our accounts receivable, as of the same date, that is, as of December 31, '31, were $858,992.41. It is my opinion, on liquidation we would get about twenty-five per cent of those, or $214,498.10. Our inventories on the same date were $1,634,905.25, and on liquidation I figure we will only get scrap, which is, as

I view it, and in my opinion, approximately ten per cent, or $163,490.52. Our real estate, buildings, machinery and equipment as of December 31, '31, were carried at $6,635,-842.84, and on present liquidation the most I can figure is $500,000. That in my opinion is high, on account of the fact I don't think we can sell them. That makes total sales of liquidation business of $2,807,796.21. Now, in liquidating we have a sales expense, naturally, and our sales expense alone in 1931, for the calendar year 1931, was $674,603.27. I figure that it will take three years to completely liquidate National Radiator Company——

Q. National Radiator Corporation?

A. Corporation, I mean—that for the first year it will cost us at least one-third of that sales expense, or $224,-867.75; that for the second year of liquidation it will cost one-half of the sales expense for the first year, or $112,-[fol. 383] 433.87, and for the third year one-half of the second year's expense, or $93,420.89. During this same period of three years' liquidation, we will unquestionably have advertising expenses. The advertising expense for the calendar year 1931 was $51,593.45, and I feel that the same expense will of course not be incurred in liquidation, but in trying to analyze it I think it would cost us at least twenty-five per cent during the first year of liquidation, which would be $12,398.36, and for the second year one-half of the twenty-five per cent, or twelve-and-a-half per cent, which would be $6,199.18, and for the third year of liquidation one-half of the second year, or $3,099.59. Now, then, a third element in the cost of liquidation, in addition to selling expense and advertising, is the cost of maintaining idle plants. We have at the present time five idle plants, which cost us to maintain, for the calendar year 1931, the sum total of $280,262.67; and if it takes three years to liquidate, that expense will not cease instantly. It cannot, in my opinion. And I think that we will have at least one-third of that expense to incur for the first year of the three-year period of liquidation, which would make it $93,420.89, and for the second year one-half of the first year's expense, or $46,710.44, and for the third year, probably a half of the second year, or $23,355.22. Now, all of those expense items, in connection with selling, advertising and idle plant maintenance, in my opinion, total $578,722.23, and that latter figure must be subtracted from our total sale figure of $2,-

807,796.21, in order to get at a net liquidating price; and subtracting those two fives a net liquidating value, in my opinion, of $2,229,073.98.

[fol. 384] Q. So that your method, if I may bring it out briefly, is to take your opinion of what you could get for all this property and deduct from it what in your opinion would be the cost of liquidating the property, and the difference represents your opinion of the net liquidating value?

A. That is right.

Q. And I believe you said that in making that computation you have assumed that it will be possible to turn all the plants into cash?

A. Yes, that is right.

Q. For purposes of your computation. Now, Mr. Heiner, are you familiar in a general way with the draft of the proposed decree that we have in proof here?

A. Yes.

Q. And the division of the company's property into Lots "A", "B", "C", and so on up to "K"—or Parcels "A" to "K"?

A. Yes.

Q. Have you made any apportionment of your net liquidating figure as between those several parcels?

A. I have.

Q. And what is it?

A. For Parcel "A"—Do you wish me to describe briefly what each parcel consists of?

Q. I don't think that will be necessary, for the decree is here.

A. Do you want them in round figures?

Q. I think round figures will be near enough.

A. For Parcel "A" $2,135,000; Parcel "B" $24,000; [fol. 385] Parcel "C" $15,000; Parcel "D" $33,000; Parcel "E" $15,000; Parcel "F" $1000; Parcel "G" $2000; Parcel "H" $1000; Parcel "I" $1000; Parcel "J" $2000; and Parcel "K", which is the total, $2,229,000.

Q. What is the basis of that distribution?

A. Well, Parcel "A" includes all cash and investments, accounts and books receivable, inventories, the Johnstown and New Castle plants, patents and all miscellaneous intangible and tangible property; while all the other individual parcels include merely the real estate, buildings and ma-

chinery. That is the reason for the large division assigned to Parcel "A", because it carries all the cash and accounts receivable, inventories, notes receivable and investments.

Q. Now, I think you have worked out there an arithmetical basis of distribution. Could you tell the Court what that is?

A. In arriving at this division of dollars assigned to each parcel, I notice that the decree applying to Parcels "B" to "J" inclusive converts one fixed asset, and therefore I felt that a proper division of percentage would be based upon the inventory that the receivers filed as of October 9th of fixed assets, and the total fixed assets under that inventory were $6,743,419.15; and dividing that figure, which was the total book value of the fixed assets, and representing one hundred per cent, into figures representing fixed assets of the various parcels, as shown in the inventory, it shows Johnstown—that is, Parcel "A", I mean, should have a percentage of fixed assets of 45 per cent, Parcel "B" 14 per cent, Parcel "C" 9 per cent, Parcel "D" 20 per cent, [fol. 386] Parcel "E" 9 per cent, Parcel "F" .5 per cent, Parcel "G" .8 per cent, Parcel "H" .35 per cent, Parcel "I" .45 per cent, Parcel "J" .9 per cent.

Q. Parcel "K" 100 per cent?

A. Parcel "K" 100 per cent.

Mr. Watts:

Q. And the six million is what?

A. $6,743,419.15, being the total book value of the fixed assets, according to the receivers' inventory as of October 9, 1931. And then, applying those percentages to $500,000, I arrive at the net liquidating value of these various parcels, which includes Parcel "A", and to Parcel "A" must be added the cash, investments, and so forth.

Mr. Teall:

Q. In other words, you have taken the fixed assets, as inventoried, for your denominator, and you have taken the fixed assets of each parcel as your numerator?

A. That is right.

Q. You have converted them into a percentage, and you have applied that percentage to the total in liquidating value that you have fixed?

A. That is right.

Cross-examination.

Mr. Watts:

Q. What inspection have you made, Mr. Heiner, as to the property, identified as Parcel "B", as appearing on page 96 of the printed form of decree?

A. That is the Trenton plant—none at all.

[fol. 387] Q. Can you tell us at what figure that property was put into the merger of the National Radiator Corporation in 1927?

A. I cannot.

Q. Now, assuming that I propounded the same question to you with respect to the other parcels, "C" to "J", inclusive, could you give us any more definite information.?

A. No, I couldn't.

Q. That is to say, you have not personally inspected any of these porperties in these different localities?

A. That is right.—Did you say "A" to "J" inclusive?

Q. "C" to "J".

A. Yes, that is right.

Q. Now, have you or your associate receiver procured appraisements of any of the properties described as Parcels "A" to "J" inclusive in this decree?

A. Appraisements?

Q. Appraisements, yes.

A. No, sir.

Q. The figures shown in the inventory on file are simply the figures at which the properties were being carried by the corporation at the time of your appointment?

A. That is right; book figures.

Q. Am I then to understand that, with respect to the Trenton property, for instance, you and your co-receiver have made no inquiry or investigation with respect to the salability of that separate property or the price at which it might possibly be sold?

[fol. 388] A. Other than that we have communicated with a company by the name of Siegel & Company, for the purpose of determining the salability of the Trenton plant, but without any result. They are engaged in liquidating companies, and we are not able to get anything definite from them at all by way of any hope or prospect, or anything like that.

Q. Have you taken any similar action with respect to any of the other properties, "C" to "J" inclusive; and if so, what?

A. Yes; the North Tonawanda and the Dunkirk, New York, plants were visited by Siegel & Company at our request, and the same result as in the Trenton case; but not any others than those three.

Q. How long ago was that, Mr. Heiner?

A. I should say January of this year or December of last year; about two months ago, I should say.

Q. Am I to understand from the calculation which you gave us, stating in detail probable expenditures in liquidating over an estimated period of three years, that you compiled the same on the basis of approximately normal selling at private sale, as distinguished from public sale?

A. No; I hadn't thought about private sale. That wasn't the basis.

Q. Wasn't the sales expense of six hundred seventy-four odd thousand dollars during the year 1931 the sales expense of your company as an operating company engaged in selling your product at private sale?

A. Oh, yes; I see what you mean. Selling boilers and radiators by our salesmen?

[fol. 389] Yes.

A. Yes, those are all private sales; they are not auction sales.

Q. So that, when you take one-third of that figure for the cost of the first year of liquidation, do you not contemplate liquidation by a corresponding method of private sale?

A. I don't know; I should think it would be sold at public sale.

Q. And how do you figure that the cost of selling off these properties, inventory, and land and buildings, would necessitate a sales cost during the first year of $224,867, if those properties were to be sold at public sale?

A. Are you talking now about the real estate?

Q. All of the property supposed to be sold.

A. Well, of course, we won't sell our merchandise and accounts receivable, and things like that, at public sale, unless we might be forced into an auction of such things; but ordinarily the personal property, I think, would be sold at private, and the real estate at public sale. But most of that cost of $224,000 will be wages to our salesmen, our

employees, in disposing of the present inventory that we have on hand. We would probably have to keep—well, if we had to keep one-third of our salesmen, which now number about 140—and having cut our wages and salaries of our employees twice since we were appointed receivers, in October, 1931, we certainly cannot cut them again, and we certainly would have to spend half that amount for the first year, just to sell the inventory alone.

Q. Well, have you made an estimate of the selling cost [fol. 390] on your basis there, for first, second, and third years? Have you totaled the selling cost for the three years, as you have estimated it??

A. No, but I could give you those for the three years.

Q. The total is over $400,000, is it not?

A. For the three years?

Q. Yes.

A. It is more than that; it is $578,722.23.

Q. Well, have you not already depreciated your inventory to $163,490?

A. That is right.

Q. So that you would expend over a half million dollars to sell much less than a half million dollars worth of merchandise?

A. But not included in the sales are the sales of the accounts receivable, inventory, real estate, buildings, machinery and equipment; and I believe that the fixed assets will be sold last. It will be much harder to sell real estate and machinery and buildings than it will scrap inventory and scrap accounts receivable.

Q. Well, you would have no salesmen to sell buildings at public sale, would you?

A. We will have a long series of expense in negotiations, traveling expense, advertising.

Q. Well, will you need salesmen to sell book accounts?

A. No.

Mr. Teall:

Q. Mr. Heiner, one question I forgot to ask you: Do you have before you there a tabulation of figures so that you [fol. 391] can tell the Court whether business was done last year at a profit or loss?

A. Yes.

Q. I don't know whether it is in shape for you to give it to us by months or not. Can you tell us what was the profit or loss on the business for the calendar year 1931?

A. Strictly accrual basis of accounting?

Q. The accrual basis of accounting—that is the way you keep your books, is it not?

A. That is right. For the entire year 1931—

Mr. Watts: May I interrupt the witness, and suggest that the statement he has be offered, rather than attempting to have it copied?

(Paper referred to marked Complainants' Exhibit "A".)

Q. Mr. Heiner, you have taken this Complainants' Exhibit "A" out of your files as receiver, and you are satisfied of the authenticity of it, are you?

A. That is right. It was prepared partly under my direction.

Mr. Teall: Complainants' Exhibit "A" is offered. And I will put on the record, for the sake of brevity and clearness, that Exhibit "A" shows an operating loss for the year 1931 of $995,832.76, and a total loss after depreciation and all expenses and charges of $1,634,167.89.

Q. Now, in this process of liquidation which you referred [fol. 392] to, and which in your opinion would take three years, would you have warehousing charges, freight charges, carting charges and other expenses that you would have in selling any property?

A. Yes, such as taxes and watchmen's servies, repairs, and other things, in addition to those that you mention.

Mr. Watts:

Q. Mr. Heiner, I neglected to ask you another question: Have you visited or inspected the property of the Steel Boiler Company at Lebanon, Pa?

A. No, I have not.

Q. In your calculation of accounts and notes receivable of eight hundred fifty-eight odd thousand dollars, do you include the indebtedness of that company to the defendant of some $86,000?

A. It is included as part of the accounts receivable.

Q. In your opinion, as receiver, should that account be depreciated to twenty-five per cent of its face amount?

A. In my opinion, the account of the National Steel Boiler Company at Lebanon should be depreciated one hundred per cent. I don't think we are ever going to get anything out of it, that particular account, if we were to start liquidating today.

Q. And is your opinion in that respect based upon an investigation of the origin of the Steel Boiler Company and its relations with the defendant?

A. It is based upon the trouble we have had in attempting to collect, so far, a small portion of the $86,000 they owe us, and we find that we can't do it unless we help them [fol. 393] along; and if our help stops, which it will do upon liquidation, then it becomes a total loss.

Q. And I repeat my question: Is your opinion that the account is worthless based upon an investigation of the origin of the Steel Boiler Company and its relations with the defendant?

A. No, not upon its origin. I am not familiar with the original beginnings of that company, to know what light that would throw upon it.

Q. In other words, you have not investigated the history of the Steel Boiler Company?

A. I have not.

Q. Or its relations with the defendant corporation?

A. Well, I know what its present relations are, if that is what you mean.

Q. That of debtor and creditor?

A. That is right; and what it manufactures, and how the steel boilers fit in our bids with radiation, if that is what you mean.

Mr. Teall:

Q. Mr. Heiner, you and Mr. Robert Waters, as receivers, have done this, I believe: You have taken over all the inventory and goods in process, and finished goods, and everything but fixed assets of this National Steel Boiler Company, applying it on the indebtedness owing by that company to the National Radiator Corporation, and you have taken a mortgage securing a demand bond upon all the fixed assets of that corporation?

A. That is right.

[fol. 394] Q. And those fixed assets are simply the plant and machinery?

A. That is right.

Mr. Watts:

Q. Are the bond and mortgage you have just testified to listed in the assets set forth in this proposed decree of sale?

A. That would be in Parcel "A", I should think, Mr. Watts.

Q. You think so? Where?

A. Well, of course, Parcel "A," according to the wording of the decree, does not give all the details.

Q. Well, if your statement is correct, that the mortgage or lien, or whatever it is, that you hold upon the assets of the Steel Boiler Company, is included in Parcel "A," then I ask you whether or not that Parcel "A" gives any notice to prospective bidders that substantially the property of the Steel Boiler Company at Lebanon, Pa., is included in this sale?

A. Well, I should think that the real estate and plant of the National Steel Boiler Company at Lebanon would not be included in it, but that the mortgage that we have would be included in the decree of sale.

Q. Do you still adhere to your opinion that the account of the defendant against the Steel Boiler Company is worthless, even though it is secured by a mortgage upon the plant of the debtor corporation?

A. I don't think, in foreclosure proceedings, we could sell that, probably, Mr. Watts.

Q. In other words, you think the property is valueless?

[fol. 395] A. On present day liquidation you can't get anything; and if you can't get any person to buy it, then, if that is the test, it is valueless.

Q. Your idea is that anything that can't be sold today is worthless?

A. If the test is, what is the present day value of it, yes.

COLLOQUY

Mr. Teall: The summary requested by Mr. Royall in his cross examination of Mr. Robert Waters has been produced and handed to Mr. Watts, the same bearing the caption

"Resumé of Fixed Assets of National Radiator Company acquired in August, 1927, by National Radiator Corporation."

I also want to state, if the Court please, that Mr. Robert Waters is sick this morning and cannot be here, and he has written me a letter in which he says that he answered a question from memory, to the effect that an option had been given to C. H. Lewis, Cleveland, Ohio, on the North Tonawanda and Framingham plants, and Mr. Waters stated that the price asked was $400,000. In checking over the records, he says he finds that the $400,000 was the figure placed on the North Tonawanda plant, and $450,000 was the price asked for the Framingham plant. When he stated that the price asked for both of them was $400,000, he was in error, and he wants to correct his testimony accordingly.

(Adjourned until Monday, March 14, 1932, at ten o'clock A. M.)

[fol. 396] Monday, March 14, 1932.

Morning Session

(Book marked Intervenor First National Bank of Cincinnati Exhibit No. 3.)

Mr. Watts: We desire to offer in evidence Exhibit No. 3, being the appraisal of Sanderson & Porter made at the time of the formation of the defendant corporation.

Mr. Teall: No objection.

Mr. Watts: We also request that the inventory filed by the Receivers and any other papers of similar import be considered part of the record available to the parties, for such portions thereof as may be material to their respective sides. Is that agreeable, Mr. Teall?

Mr. Teall: No objection.

Mr. Royall: In lieu of Mr. John H. Waters' testimony in amplification of some general figures as to the price at which the old National Radiator Company was acquired by the defendant, National Radiator Corporation, at the time of the 1927 merger, the following figures are furnished: Debentures in the principal amount of $5,935,000; preferred stock, 35450 no par value shares at transfer price [fol. 397] of $100, $3,545,000; common stock, 70,000 shares,

no par value, at transfer price of $36.00, $2,520,000; cash $1,290,000; total $13,290,000.

Here is a memorandum regarding and amplifying the testimony of Mr. Robert S. Waters re the financing furnished by the defendant corporation in respect of the Steel Boiler Company: To acquire property at Lebanon, Pennsylvania, June, 1930, $49,500. Above paid by 350 shares $100 par value common stock, August 9, 1930, $35,000; cash to cover balance $14,500; and then extended to the right-hand column, $49,500. To cover merchandise purchased, payrolls and expenses incurred at plant, and salaries paid from the Corporation office: For merchandise $107,074.97; payrolls and expenses at plant, $30,648.66; salaries paid from Corporation office, $27,236.30; total $164,959.93. Payments on above: Steel boilers furnished the Corporation, $81,708.78; inventory at plant, transferred to Corporation, $44,751.34; total $126,460.12. Balance owing Radiator Company by Boiler Company, $38,499.81. The testimony, we should note, was that the balance was $86,000.

Mr. Teall: That was at the date of the receivership, I think.

Mr. Royall: Well, this is at the date of the receivership.

Mr. Teall: No, this is right now. The date is March 11, 1932, I think.

[fol. 398] Mr. Royall: It is dated March 11th, but at the top it says "From June, 1930, to October, 1931."

Mr. Teall: Well, that is the advances, but the payments are not all of that date.

Mr. Royall: Then is it understood that this balance of $38,499.81 is as of the present date?

Mr. Teall: Yes.

Mr. Royall: And that during the course of the receivership further liquidation of this eighty-six thousand odd balance has been made by way of delivery of further steel boilers?—And is this true, Mr. Teall: The figure given by Mr. Waters of about $86,000, the balance due as of the date of the receivership, is reconciled with the March 11, 1932 balance of $38,499.81, by a credit passed by the receivers to the Steel Boiler Company of $44,751.34 for inventory at the Steel Boiler plant, transferred to the Cor-

poration, or to the receivers on account of the Corporation? Is that correct, Mr. Teall?

Mr. Teall: Yes, that is correct.

Testimony closed.

(Oral argument by counsel for respective sides.)

[fol. 399] Reporter's certificate to foregoing omitted in printing.

INTERVENER FIRST NATIONAL BANK OF CINCINNATI EXHIBIT No. 1

$12,000,000

National Radiator Corporation 6½% Sinking-Fund Gold Debentures

To be authorized: $16,000,000.

To be dated: August 1, 1927.

To be issued: $12,000,000.

To mature: August 1, 1947.

Interest payable August 1 and February 1, without deduction for any Federal Income Tax not exceeding 2% which the Corporation or the Trustee may be required or permitted to pay thereon or retain therefrom. The Corporation will refund upon proper application any Pennsylvania or Connecticut personal property tax not in excess of [fol. 400] four mills, any District of Columbia personal property tax not in excess of five mills, any Maryland securities tax not in excess of four and one-half mills or any Massachusetts income tax not to exceed 6% per annum. Principal and interest payable at Bankers Trust Company, New York, Trustee, or at J. & W. Seligman & Co., New York, or at Continental and Commercial Trust and Savings Bank, Chicago. Redeemable as a whole or in part on any interest date upon not less than 40 days' published notice on or prior to August 1, 1932 at 107½ and accrued interest; thereafter through August 1, 1937 at 106 and accrued in-

terest; thereafter through August 1, 1942 at 104½ and accrued interest; and thereafter and prior to maturity at 103 and accrued interest. Coupon Debentures of $1,000 and $500 denominations, interchangeable and registerable as to principal only.

Bankers Trust Company, New York, Trustee.

The following information has been summarized by John H. Waters, Esq., Chairman of the Board of Directors of the Corporation, from his accompanying letter to us:

Business: National Radiator Corporation has been organized under the laws of Delaware to acquire assets and business of the following six companies:

National Radiator Company,
Utica Heater Company,
Niagara Radiator & Boiler Company,
Gurney Heater Manufacturing Company,
[fol. 401] Continental Heater Corporation,
Union Radiator Company,

all of which have been in successful operation over a long period of years.

National Radiator Corporation, upon acquisition of these various properties, will be the second largest manufacturer in the world of steam and hot water radiators and cast iron boilers for heating purposes. The wide variety of its products meets the heating requirements of buildings of every character from small dwellings to office buildings, apartments, hotels, schools, churches, theatres and similar types of structures.

The Corporation will own ten plants, two of which are located at Johnstown, Pa., two at New Castle, Pa., and one each at Trenton, N. J., Utica, Dunkirk and North Tonawanda, N. Y., Framingham, Mass., and Chicago, Ill. Through the favorable location of its various plants and warehouses the Corporation will be in a position to serve practically all the consuming markets of the United States.

Capitalization: The capitalization of the Corporation, upon consummation of the plan for the acquisition of assets and business of the six predecessor companies, and the financing incident thereto, will be as follows:

[fol. 402]

	Authorized	To be presently outstanding
6½% Sinking Fund Gold Debentures, due August 1, 1947 (this issue)	$16,000,000	$12,000,000
$7 Cumulative Convertible Preferred Stock (no par value)	90,000 shs.	60,000 shs.
Common Stock (no par value).	*500,000 shs.	270,000 shs.

* Includes 180,000 shares to be reserved for conversion of the authorized Preferred Stock.

Security: These Debentures will be, in the opinion of counsel, the direct obligations of the Corporation and, upon the completion of this financing, will constitute its sole funded debt.

Earnings: The combined net earnings of the six predecessor companies, assets of which are to be owned by National Radiator Corporation, for the four years ended December 31, 1926, as certified to by Deloitte, Plender, Griffiths & Co., were as follows:

	Earnings available for interest after depreciation, but before Federal taxes	Annual interest requirement on $12,000,000 Debentures: Times earned
1923	$2,456,076	3.14
1924	3,405,763	4.36
1925	3,488,980	4.47
1926	3,472,184	4.45

Earnings available for interest for the four year period, as shown above, have averaged $3,205,751 annually, equivalent to 4.11 times annual interest requirements on this [fol. 403] issue of Debentures and for the year 1926 were 4.45 times such requirements.

The six predecessor companies report earnings, after provision for depreciation, but before interest and Federal Income Taxes, of approximately $601,000 for the six months ended June 30, 1927, as compared with approximately $892,000 for the corresponding period of 1926. Unfilled orders as of June 30, 1927, amounted to about $4,270,000 as compared with about $2,200,000 at the corresponding date in 1926. Normally, about two-thirds of the radia-

tor and boiler business is done in the last half of the year and a still greater proportion of the net earnings realized in that period.

Balance Sheet: The balance sheet of National Radiator Corporation as of December 31, 1926, after giving effect to the acquisition, as of that date, of properties and assets to be presently owned, to the appraisals as of the same date by Messrs. Sanderson & Porter of real estate, plant and equipment, to the present financing and transactions incident thereto, as certified to by Deloitte, Plender, Griffiths & Co., shows total current assets of $10,742,547 as compared with total current liabilities of $1,478,061, or a ratio of 7¼ to 1. Tangible assets, after deducting all liabilities except these Debentures, were approximately $18,000,000.

Sinking Fund: The Indenture under which the Debentures are to be issued will provide for a cumulative semi-annual Sinking Fund, calculated to be sufficient to retire the entire issue by maturity through call by lot at the pre-[fol. 404] vailing redemption price. The Corporation may offer Debentures at their redemption price in lieu of cash for the Sinking Fund.

Purpose of Issue: These Debentures, together with 60,000 shares of $7 Cumulative Convertible Preferred Stock of no par value and 270,000 shares of Common Stock of no par value are being issued in connection with the acquisition of assets and business of the six predecessor companies.

Management: The operating management will continue in the hands of former executives of the predecessor companies. John H. Waters, President of National Radiator Company is the Chairman of the Board of Directors, Edward Norris, President of Utica Heater Company will be the President, and E. C. Andrews, President of Niagara Radiator & Boiler Company, will be the Chairman of the Advisory Committee. The management and associates will have a substantial interest in the new Corporation through acquisition of approximately 43% of its Common Stock, and will also acquire substantial amounts of these Debentures and of the Preferred Stock.

Listed on the Chicago Stock Exchange.

Application will be made to list these Debentures on the New York Stock Exchange.

Price 100 and accrued interest to yield 6.50%.

These Debentures are offered for delivery when, as and if issued and received by us and subject to approval of [fol. 405] counsel. Legal matters in connection with the Indenture and the issuance of these Debentures are to be passed upon by Messrs. Murray, Aldrich & Roberts for the bankers and by Messrs. White & Case for the Corporation. It is expected that interim receipts or temporary Debentures will be available for delivery on or about September 1, 1927.

Statements while not guaranteed are based upon information which we believe to be reliable.

August 10, 1927.

National Radiator Corporation

(Organized under the Laws of the State of Delaware)

Balance Sheet, December 31, 1926

After giving effect to the acquisition as of December 31, 1926, of properties and assets to be presently owned, to the appraisals by Messrs. Sanderson & Porter of real estate, plant and equipment, to the present financing and transactions incident thereto, as certified to by Deloitte, Plender, Griffiths & Co.

[fol. 406]

Assets

Current Assets:		
Cash		$2,972,900.48
Marketable Securities at cost		112,084.99
Accounts and Notes Receivable, less reserve	4,336,401.43	
Miscellaneous Advances	151,329.87	
Inventories, at lower of cost or market, less reserve	3,169,830.43	
Total Current Assets		$10,742,547.20

Investments:		
Shares of Lincoln Radiator Company (including equity of $85,712.01 in undistributed profits)	$160,712.01	
Miscellaneous	142,597.20	
		303,309.21
Special Deposits		41,916.66
Real Estate, Machinery, Patterns and other Equipment as appraised as of December 31, 1926, by Messrs. Sanderson & Porter		8,217,359.00
Goodwill, Trade Marks and Patents		6,818,092.75
Prepaid Expenses and Deferred Assets		69,036.90
Total		$26,192,261.72

[fol. 407]

Liabilities

Current Liabilities:		
Accounts Payable		$640,684.79
Accrued Accounts		382,918.16
Provision for Taxes		454,458.77
Total Current Liabilities		$1,478,061.72
6½% Sinking Fund Gold Debentures, Due 1947		12,000,000.00
Capital Stock and Surplus:		
$7 Cumulative Convertible Preferred Stock (no par value) Preferred upon liquidation $100 per share —60,000 shares outstanding	$11,500,000.00	
Common Stock (no par value) 270,000 shares outstanding surplus	1,214,200.00	
		12,714,200.00
Total		$26,192,261.72

National Radiator Corporation

August 6, 1927.

Bankers Trust Company, J. & W. Seligman & Co.

GENTLEMEN: In connection with your offering of 6½% Sinking Fund Gold Debentures of National Radiator Cor-
[fol. 408] poration, I take pleasure in furnishing you with the following information:

Business

National Radiator Corporation has been organized under the laws of Delaware to acquire assets and business of the following six companes:

National Radiator Company,
Utica Heater Company,
Niagara Radiator & Boiler Company,
Gurney Heater Manufacturing Company,
Continental Heater Corporation,
Union Radiator Company,

all of which have been in successful operation over a long period of years.

National Radiator Corporation, upon acquisition of these various properties, will be the second largest manufacturer in the world of steam and hot water radiators and cast iron boilers for heating purposes. The products manufactured comprise radiators of all the standard sizes and types; low pressure cast iron heating boilers, both round and sectional, of the most efficient designs, for burning hard coal, soft coal, coke, oil and gas; warm air heating equipment; and hot water supply boilers. This wide variety of products meets the heating requirements of buildings of every character from small dwellings to office buildings, apartments, hotels, schools, churches, theatres and similar types of structures.

The high reputation which the Corporation's products bear is indicated by the large increase in their output. The
[fol. 409] combined production by the six predecessor companies of radiators, measured in square feet of radiating surface, increased from 22,982,370 sq. ft. in 1923 to 39,820,-878 sq. ft. in 1926 while production of boilers, expressed

in pounds of iron used, increased during the same period from 48,346,696 lbs. to 65,555,415 lbs.

Plants and Properties

The Corporation will own ten plants, two of which are located at Johnstown, Pa., two at New Castle, Pa., and one each at Trenton, N. J., Utica, Dunkirk and North Tonawanda, N. Y., Framingham, Mass., and Chicago, Ill. The plants are well equipped and maintained and are advantageously placed with respect to the principal consuming markets and to raw material supply. They have a total annual capacity, upon complete installation of the new radiator plant at New Castle, of approximately 60,000,000 square feet of radiating surface, and over 85,000,000 pounds of boilers. Warehouses and/or branch offices are maintained in New York, Boston, Philadelphia, Chicago, Cleveland, Pittsburgh, Baltimore, Cincinnati, Richmond and other important cities throughout the east and middle west.

Through the favorable location of its various plants and warehouses the Corporation will be in a position to serve practically all the consuming markets of the United States. A number of the plants will have easy access to water transportation for shipment on the Great Lakes and to the Pacific Coast as well as to export markets.

[fol. 410] It is expected that the unification of the businesses of the several companies will prove beneficial from the standpoint both of production and distribution, and should result in substantial operating economies. Immediate benefits are in prospect from the elimination of duplication in warehouse and sales facilities in the same cities and important economies are also expected to accrue from reduction in administration expenses, from the coordination and better distribution of manufacturing operations, and from greater standardization of manufacturing processes and of products. The consolidation of activities will permit more effective advertising, and enable research work to be undertaken on a more comprehensive scale.

Capitalization

The capitalization of the Corporation, upon consummation of the plan for the acquisition of assets and business

of the six predecessor companies, and the financing incident thereto, will be as follows:

	Authorized	To be presently outstanding
6½% Sinking Fund Gold Debentures, due August 1, 1947 (this issue)	$16,000,000	$12,000,000
$7 Cumulative Convertible Preferred Stock (no par value)	90,000 shs.	60,000 shs.
Common Stock (no par value).	*500,000 shs.	270,000 shs.

* Includes 180,000 shares to be reserved for conversion of the authorized Preferred Stock.

[fol. 411] Security

These Debentures will be, in the opinion of counsel, the direct obligations of the Corporation and, upon the completion of this financing, will constitute its sole funded debt. The Indenture under which the Debentures are to be issued will provide in substance, among other covenants, that so long as any of the Debentures issued thereunder are outstanding the Corporation will not mortgage or pledge or place any lien whatsoever on any of its properties or assets, except as hereinafter provided, unless such Debentures shall be secured by a prior lien upon the property so encumbered. The Indenture will further provide that the $4,000,000 principal amount of Debentures to be authorized, but not to be presently issued, may not be issued in excess of 66⅔% of the cost or fair value, whichever is lower, of new property acquired or of additions and betterments to the properties, and only when the net income of the Corporation, as defined in the Indenture, for 24 consecutive calendar months within the preceding 30 calendar months shall have been at least two and one-half times the interest charges for a like period upon all outstanding indebtedness of the Corporation, including the Debentures to be issued. The Corporation covenants that, so long as any Debentures of this issue are outstanding, it will not issue any funded debt except under the above restrictions as to net income and the acquisition of new property or additions and betterments. Nothing in the covenants shall be deemed to apply to purchase money mortgages or the assumption of

[fol. 412] liens on property hereafter acquired or to the refunding or extension of the same, or to obligations incurred in the ordinary course of business maturing within one year from date which may be secured or unsecured.

Earnings

The combined net earnings of the six predecessor companies, assets of which are to be owned by National Radiator Corporation, for the four years ended December 31, 1926, as certified to by Deloitte, Plender, Griffiths & Co., were as follows:

	Earnings available for interest after depreciation, but before Federal taxes	Annual interest requirement on $12,000,000 Debentures: Times earned
1923	$2,456,076	3.14
1924	3,405,763	4.36
1925	3,488,980	4.47
1926	3,472,184	4.45

Earnings available for interest for the four year period, as shown above, have averaged $3,205,751 annually, equivalent to 4.11 times annual interest requirements on this issue of Debentures and for the year 1926 were 4.45 times such req-irements.

The six predecessor companies report earnings, after provision for depreciation, but before interest and Federal Income Taxes, of approximately $601,000 for the six months ended June 30, 1927, as compared with approximately $892,000 for the corresponding period of 1926. Unfilled orders as of June 30, 1927 amounted to about $4,270,000 as [fol. 413] compared with about $2,200,000 at the corresponding date in 1926. Normally, about two-thirds of the radiator and boiler business is done in the last half of the year and a still greater proportion of the net earnings realized in that period.

Balance Sheet

The balance sheet of National Radiator Corporation as of December 31, 1926 (copy of which is attached hereto) after giving effect to the acquisition, as to that date, of properties and assets to be presently owned, to the appraisals as of the same date by Messrs. Sanderson & Porter

of real estate, plant and equipment, to the present financing and transactions incident thereto, as certified to by Deloitte, Plender, Griffiths & Co., shows total current assets of $10,742,547 as compared with total current liabilities of $1,478,061, or a ratio of over 7¼ to 1. Tangible assets after deducting all liabilities except these Debentures, were approximately $18,000,000.

Sinking Fund

The Indenture under which the Debentures are to be issued will provide for a cumulative semi-annual Sinking Fund, calculated to be sufficient to retire the entire issue by maturity through call by lot at the prevailing redemption price. The Corporation may offer Debentures at their redemption price in lieu of cash for the Sinking Fund.

Purpose of Issue

These Debentures, together with 60,000 shares of $7 Cumulative Convertible Preferred Stock of no par value [fol. 414] and 270,000 shares of Common Stock of no par value are being issued in connection with the acquisition of assets and business of the six predecessor companies.

Management

The operating management will continue in the hands of former executives of the predecessor companies. John H. Waters, President of National Radiator Company is the Chairman of the Board of Directors, Edward Norris, President of Utica Heater Company will be the President, and E. C. Andrews, President of Niagara Radiator & Boiler Company, will be the Chairman of the Advisory Committee. The management and associates will have a substantial interest in the new Corporation through acquisition of approximately 43% of its Common Stock, and will also acquire substantial amounts of these Debentures and of the Preferred Stock. The Corporation will have the benefit of the experience of other executives of the predecessor companies all of whom have been notably successful in the development of their respective companies.

General

Due to the climatic conditions of a large part of the United States and to the high standards of living in the country, the manufacture of heating equipment has become of fundamental importance. Steam and hot water radiation has come to be regarded as the most healthful, convenient and economical method of distributing heat. The growing [fol. 415] recognition of its superiority is reflected in the increase in radiator and boiler installations over a long period of years. Shipments for 1925 and 1926 were the highest ever recorded for the industry.

The growing wealth of the country and the increase in its population estimated at over 1,500,000 annually, have resulted in continuous replacement of older structures by new and better grade buildings. While minor variations may take place from year to year in building construction, the demand for modern homes, schools, public buildings and other structures will undoubtedly continue to increase in keeping with the improving living standards of the country. In practically all such new buildings radiators and boilers are an indispensable part of the equipment. In addition to new construction there is an increasingly important demand for radiators and boilers in the very large number of homes which have not yet been equipped with central heating plants and for replacement of obsolete or worn out equipment by the new improved type of products. These various sources of demand offer a wide potential market for the radiator and boiler industry.

Very truly yours, John H. Waters, Chairman of the Board of Directors.

[fol. 416] In United States District Court

Opinion—Filed May 31, 1932

Gibson, District Judge:

The plaintiffs compose a committee for the reorganization of the defendant company. The defendant company admitted the allegations of plaintiffs' bill of complaint and consented to the relief sought therein. The Bankers Trust Company, a corporation of the State of New York, Trus-

tee under an issue of debentures by the defendant, has intervened as a party plaintiff, and the First National Bank of Cincinnati, a holder of debentures to the amount of $68,000, and the International Heater Company, a general creditor, have intervened as party defendants. The plaintiffs represent holders of more than 95% of the debentures issued by the defendant company. The total of these debentures outstanding when the bill of complaint was filed, interest uncounted, is $10,705,000. The general indebtedness of the defendant is comparatively very small.

The bill of complaint prays, *inter alia*, the sale of the defendant's properties situated in ten Districts. The only intervening defendant appearing at the trial in opposition to the prayers of the bill was the First National Bank of Cincinnati. Its opposition was forcibly presented, but analysis does not show its contentions to be forceful. By implication rather than specific charge, it alleged improper collusion between the original plaintiffs, the intervening plaintiff and the Radiator corporation, defendant. In so doing it based its contention largely upon the fact that the de- [fol. 417] fendant had more than sufficient funds on hand to pay the interest upon the debentures at the time it defaulted in the payment of it. It did not undertake to deny that the defendant company had lost in operation about $1,500,000 for each of the last three years preceding the filing of the bill of complaint, or that it was moving toward inevitable bankruptcy when the instant suit was instituted. The most tangible effort of the intervening defendant was put forth in an effort to have a large "upset" price fixed by the Court in ordering a sale of the defendant company's properties. It also urged that a sale should not be ordered until the depression period had passed. As to the contention last mentioned, it is possible, and we hope, that conditions will improve in the near future, but in view of the fact that the expenses of the receivership are very heavy, and the operation of the defendant company is at a considerable loss, we feel it would be improper to undertake to exercise a gift of prophecy which has not actually been conferred upon us. Such attempt might well result in greater loss.

In our opinion, the evidence has disclosed no fraudulent collusion between the plaintiffs and defendants. It does show, we think, a very present need for reorganization of the Radiator Corporation, and the means suggested in the

bill seem to us to furnish a reasonable chance to avoid further loss by creditors. The holders of a small proportion of the company's indebtedness do not agree with this opinion, and such creditors are entitled to consideration by the Court. This does not mean that we should overturn the plans of the great majority of the creditors to save some [fol. 418] part of their claims unless those plans unfairly encroach upon the rights of the minority claimants. In the instant case we discern no such encroachment. All the creditors were given the opportunity to participate in the plan of the majority. The small minority did not want to participate in the reorganization plan of the majority. Under such circumstances the rights of the minority creditors seem plain. They are entitled to recover the amount of the indebtedness to them by judicial sale of the properties of the defendant, or, in event those properties are fairly sold for less than the total indebtedness of defendant, for that proportion of the net proceeds of the sale which their claims bear to the total indebtedness.

The defendant has defaulted in the payment of interest upon its bonds, and the sale of its properties is inevitable. All who appeared at the hearing agreed upon this proposition, although differing as to the proper time for the sale and the minimum price, or prices, of the properties at which the Court would confirm the sale. The difference at the hearing between the creditors desiring reorganization and the single creditor urging complete liquidation was wide. The latter pointed to the appraisement of the various component properties at the time the combination of plants was formed in 1926, and demands that an "upset" price of over $10,000,000 be fixed as the minimum confirmation price. The appraisement was upon operating plants and based upon replacement costs as of December 31, 1926. This appraisal is of little value in the determination of liquidation value at present, when only two of the eight plants in [fol. 419] the combination are operating, and those two not fully. The intervening defendant has introduced no witness to contradict the witnesses of the plaintiffs who have testified as to present liquidating values. Its claim is so plainly extravagant as to make it worthy of little consideration. The witnesses of the plaintiffs have fixed the liquidating value of the assets of the defendant company at a little less than $2,500,000, and we think this amount reasonably repre-

sents a minimum price for the properties of defendant at which a sale of them might be confirmed by the Court. The allocation of this amount among the various properties is set forth in the decree.

The intervening defendant's counsel have cited Northern Pacific Railway Company v. Boyd, 228 U. S. 482, in an attack upon the reorganization plan set forth in the bill. That case holds that no reorganization plan may allow stockholders to exchange their shares in the old company for shares in the new, unless the rights of general creditors have been protected. The instant case is not one wherein the stockholder has been benefited at the expense of general creditors. In the proposed reorganization of the present case the creditors are given the senior securities of the new company. Common stockholders of the old company may obtain stock in the new, but only upon condition of payment of a cash assessment. In view of the fact that the properties are by the decree ordered to be sold, this contention is somewhat immaterial. The creditors who have adopted the reorganization plan are satisfied with the provisions, and those who have not accepted it will have their rights protected by the sale.

[fol. 420] Findings of Fact

The findings of fact are as set forth in paragraphs 1 to 28, inclusive, of the decree hereinafter set forth, now referred to and made part hereof.

Conclusions of Law

The plaintiffs are entitled to a decree ordering the sale of the assets and properties of the defendant company.

In United States District Court

Final Decree of Sale—Filed May 31, 1932

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, this Court being duly advised in the premises, it is

Found, ordered, adjudged, and decreed as follows:

Article I

Jurisdictional Facts and Citizenship of Parties

1. This Court has jurisdiction of all the parties to this cause and of the subject matter therein involved.

2. At all times mentioned in that behalf in the bill of complaint in this cause (hereinafter called the "Bill"), the complainants Rudolph B. Flersheim and Charles O. Cornell were and still are residents and citizens of the State of New York; the complainant John H. Waters was [fol. 421] and still is a resident and citizen of the Commonwealth of Pennsylvania; and the complainant Frank B. Cahn was and still is a resident and citizen of the State of Maryland.

3. The defendant National Radiator Corporation (hereinafter called "National Radiator") was at the time of the institution of this suit, and at all times since has been and now is, a corporation duly organized and existing under the laws of the State of Delaware and a citizen and resident of said State, and, at all the times aforesaid, the principal office of National Radiator has been and now is in the City of Johnstown, in the County of Cambria, in the Commonwealth of Pennsylvania, in the Western District of Pennsylvania, and a substantial part of the properties owned by National Radiator was and is located in said Western District of Pennsylvania, including two manufacturing plants in said City of Johnstown, a manufacturing plant near the City of New Castle, in the Clunty of Lawrence, and other properties and assets. National Radiator is engaged principally in the business of manufacturing and selling heating appliances, round and sectional boilers, and hot water and steam radiators. The greater part of the real estate owned by National Radiator and/or its Receivers hereinafter referred to, which is to be sold under this Decree and is more particularly described in Schedule A hereto annexed, is located in said County of Lawrence, in the Commonwealth of Pennsylvania.

4. This is a suit of a civil nature in equity between citizens of different states in which the matter in controversy exceeds the sum of $5,000, exclusive of interest, costs and expenses.

[fol. 422] 5. Bankers Trust Company (hereinafter called "Bankers Trust"), a party plaintiff in this cause pursuant to Order No. 11 of January 9, 1932, granting it leave to intervene in this cause as Trustee and judgment creditor, at all times hereinafter mentioned was and still is a corporation duly organized and existing under the laws of the State of New York, having its principal office and place of business in the City, County and State of New York, and a citizen and resident of said State.

Article II

Proceedings Had in This Cause and Ancillary Causes

6. The Bill was filed on October 5, 1931; and, on October 9, 1931, National Radiator, by its answer, admitted the truth of the allegations contained in the Bill, joined in the prayers thereof, and consented to the appointment of a receiver or receivers as prayed for in the Bill; and thereupon, by Decree No. 1 in this cause dated October 9, 1931, Robert S. Waters, of Johnstown, Pennsylvania, and William G. Heiner, of Pittsburgh, Pennsylvania (hereinafter sometimes called the "Receivers"), were appointed receivers of all the property and business of National Radiator wheresoever situate, with authority to take possession of said property and business and to continue to carry on the business of National Radiator as a going concern.

7. The Receivers so appointed by Decree of this Court promptly qualified as such and thereupon, under authority of said Decree, entered upon and took possession of all [fol. 423] the property of National Radiator and (except as hereinafter stated) have since continuously held possession thereof and carried on the business of National Radiator under said Decree and other orders and decrees entered in this cause and the below mentioned ancillary causes, as on file.

8. After the filing of the Bill, ancillary causes similar to this cause were instituted by the complainants against National Radiator, in aid of the proceedings in this cause, in the below mentioned courts; and, by orders of said courts entered in said ancillary causes on the respective dates hereinbelow set forth, said Robert S. Waters and William

G. Heiner were appointed ancillary receivers of all the property and business of National Radiator within the respective territorial jurisdictions of said courts, to wit:

District Court of the United States for the	Date of Appointment
District of New Jersey	October 9, 1931
District of Massachusetts	October 20, 1931
Southern District of Ohio, Western Division	October 22, 1921
Western District of New York	October 23, 1931
Northern District of Illinois, Eastern Division	October 23, 1931
District of Maryland	November 5, 1931
Eastern District of Virginia	November 13, 1931
Eastern District of New York	December 24, 1931
and	
Supreme Court of the District of Columbia	November 30, 1931

Said Robert S. Waters and William G. Heiner so appointed as ancillary receivers, duly qualified as such.

[fol. 424] On November 18, 1931, an action was instituted against National Radiator in the Circuit Court of the City of St. Louis, Missouri, by one Abraham Ring, who, as the owner of 50 shares of the Common Stock of National Radiator, filed a petition praying for the appointment of a so-called "ancillary receiver"; and thereupon, without previous notice to National Radiator or the Receivers, said Circuit Court of the City of St. Louis appointed one J. M. Feigenbaum as a so-called "ancillary receiver" of National Radiator. Forthwith after such appointment, said J. M. Feigenbaum ordered the agent of the Receivers, who was at that time in possession of the premises and property of National Radiator in the City of St. Louis, to vacate said premises and property and to turn over the same to said J. M. Feigenbaum, and thereupon said agent of the Receivers relinquished possession of said premises and property to said J. M. Feigenbaum or his deputy. Shortly thereafter, the Receivers caused said action to be removed from said Circuit Court of the City of St. Louis to the District Court of the United States for the Eastern District of Missouri, Eastern Division, and caused a motion to be made in said cause for the dismissal of said petition of said Abra-

ham Ring and for the discharge of said J. M. Feigenbaum as receiver, upon the ground that said petition did not state a good cause of action in equity. Thereafter, and on or about January 27, 1932, while said motion for the dismissal of said petition and for the discharge of said J. M. Feigenbaum as receiver was pending, the complainants instituted an ancillary cause, similar to this cause, against National Radiator, in the District Court of the United States for the [fol. 425] Eastern District of Missouri, Eastern Division, in aid of the proceedings in this cause, and thereafter, and on or about February 15, 1932, said District Court dismissed the above-mentioned petition of said Abraham Ring and thereby terminated the action instituted by him as aforesaid and the appointment of said J. M. Feigenbaum as receiver; and, by order entered in said last mentioned ancillary cause, said District Court, on February 15, 1932, appointed Robert S. Waters and William G. Heiner ancillary receivers of all the property and business of National Radiator within the territorial jurisdiction of said court. Said Robert S. Waters and William G. Heiner, so appointed as ancillary receivers, duly qualified as such and thereupon entered upon, and took possession of, the premises and property of National Radiator in said City of St. Louis.

9. On October 9, 1931, an action was instituted by the complainants herein in the Court of Chancery of the State of Delaware, and, by the decree of said court dated October 12, 1931, said Robert S. Waters and one Robert H. Richards, Jr., a citizen of Wilmington, Delaware, were appointed receivers of and for National Radiator, with power to take charge of the estate, effects, business and affairs of National Radiator, and, in so far as it might be necessary in their judgment, to continue the business of National Radiator for the purpose of conserving its estate, until the further order of said court. At the time of the institution of said action, National Radiator did not own, and at no time since has it owned, any property or assets situate within the State of Delaware.

[fol. 426] 10. On January 9, 1932, Bankers Trust, as Trustee under that certain Indenture dated August 1, 1927, made by National Radiator to said Trustee, with leave of this Court by said Order No. 11 first granted, filed in this cause its Intervening Petition against National Radiator, pray-

ing, among other things, that two certain judgments obtained by Bankers Trust, as Trustee, as alleged in said Intervening Petition, be enforced in this cause and that this Court ascertain and decree the rights of Bankers Trust, as Trustee and judgment creditor, and the rights of the holders of the 6½% Sinking Fund Gold Debentures of National Radiator (hereinafter called the "Debentures") issued under said Indenture, and the coupons thereto appertaining, and for other relief as set forth in said Intervening Petition, including the relief prayed for in the Bill. Thereafter, with leave of court first granted, Bankers Trust filed similar intervening petitions in the various ancillary causes mentioned in Section 8 of this Decree.

On or about February 13, 1932, National Radiator filed in this cause its answer to said Intervening Petition of Bankers Trust, admitting each and every allegation in said Petition and joining in the prayers thereof. No answers to said Intervening Petition have been filed by any of the other parties to this cause. Similar answers were filed by National Radiator to the intervening petitions filed as aforesaid in the ancillary causes.

11. On February 17, 1932, the First National Bank of Cincinnati, as the owner of $68,000 principal amount of Debentures, filed in this cause its petition for leave to intervene herein as a party defendant, for the purpose of pro- [fol. 427] tecting its rights and the rights of Debentureholders similarly situated who might join in such intervention and contribute to the expense thereof; and, by Order No. 16 entered herein on March 3, 1932, upon consent of the parties hereto given in open court on the final hearing of this cause, the First National Bank of Cincinnati was made a party defendant to this cause, in subordination to and in recognition of the propriety of the main proceeding.

On March 31, 1932, International Heater Company, as the owner of $60,000 principal amount of promissory notes of National Radiator, filed in this cause its petition for leave to intervene herein as a party defendant; and, by Order No. 17 entered herein on March 31, 1932, International Heater Company was permitted to intervene as a party to this cause in accordance with Rule 37 of the Equity Rules.

Article III

Authorization, Execution and Delivery of the Indenture; Issue of Debentures; Defaults under the Indenture; Judgments Obtained by Bankers Trust for Principal and Interest of Debentures; Claims of General Creditors.

12. Shortly before August 30, 1927, National Radiator duly authorized the issue of the Debentures in the aggregate principal amount of $16,000,000. The Debentures were to be coupon debentures in denominations of $1,000 and $500, to be dated August 1, 1927, to be payable August 1, 1947, and to bear interest from August 1, 1927, at the rate of 6½% per annum, payable semi-annually on the 1st [fol. 428] days of February and August in each year, upon the presentation and surrender of the interest coupons thereto attached, and were to be in the form or substantially the form set forth in the Indenture hereinafter mentioned. For the purpose of setting forth the terms and provisions governing the issue of the Debentures and appurtenant coupons and the rights and remedies of the holders thereof, on or about August 30, 1927, National Radiator duly made and executed under its corporate seal and delivered to Bankers Trust, as Trustee, its Indenture dated August 1, 1927 (hereinafter called the "Indenture"). At the time of the execution and delivery of the Indenture, Bankers Trust was duly authorized and empowered to act as Trustee thereunder and duly accepted the trusts under the Indenture and united in the execution of the Indenture. "Schedule A" annexed to and made a part of the Bill is a full, true and correct copy of the Indenture.

The Indenture was and is the proper act and deed of National Radiator, was by it duly authorized, made and delivered in all respects in conformity with law, and remains and now is in full force and effect.

After the execution and delivery of the Indenture, and on or about August 30, 1927, National Radiator duly executed $12,000,000 aggregate principal amount of Debentures with all appurtenant coupons, in substantially the form provided by the Indenture, and Bankers Trust, as Trustee, authenticated the same and delivered them to or upon the order of National Radiator, all in accordance with the provisions of the Indenture.

[fol. 429] 13. Thereafter National Radiator duly negotiated and sold for value and issued to numerous bona fide purchasers thereof said $12,000,000 aggregate principal amount of Debentures with all coupons for interest thereunto appertaining. Of the Debentures so issued, $1,169,000 principal amount have been delivered by National Radiator, from time to time since the execution of the Indenture and prior to the verification of the Bill, to Bankers Trust, as Trustee, for cancellation in lieu of the semi-annual Sinking Fund payments provided for in the Indenture, and the Debentures so delivered have been cancelled by Bankers Trust, all as provided in the Indenture.

14. Of the Debentures issued as aforesaid, $158,000 principal amount have been purchased and acquired by National Radiator and have been cancelled and delivered to Bankers Trust by National Radiator and/or the Receivers, so that at the present time $10,673,000 principal amount of Debentures are outstanding in the hands of divers persons who are the owners and holders thereof for value and said Debentures are now in all respects valid and outstanding obligations of National Radiator.

15. On February 1, 1931, National Radiator made default in payment of the interest then falling due on all of the Debentures issued and outstanding as aforesaid, although the coupons or some thereof appurtenant to said Debentures were duly presented for payment and payment duly demanded.

16. On or about February 11, 1931, the complainants, Ru-
[fol. 430] dolph B. Fershem, Charles O. Cornell and John H. Waters, under a Plan and Agreement of Reorganization dated February 11, 1931 (hereinafter called the "Plan and Agreement"), constituted themselves a Reorganization Committee for the purpose of effecting the reorganization of National Radiator. "Schedule B" annexed to and made a part of the Bill is a full, true and correct copy of the Plan and Agreement. On or about September 1, 1931, the complainant Frank B. Cahn was duly elected a member of the Reorganization Committee as provided in Article 16 of the Reorganization Agreement with the effect in said Article 16 provided. The Plan and Agreement provides, among other things, that holders of Debentures may be-

come parties to said Plan by depositing their Debentures with the February 1, 1931 and all subsequent coupons with Bankers Trust, as Depositary, and that such deposit of Debentures shall transfer to and vest in the Reorganization Committee the legal title to such deposited Debentures and the coupons appertaining thereto. Prior to the institution of this suit, more than $8,736,000 principal amount of Debentures had been deposited with Bankers Trust, as Depositary under the Plan and Agreement, together with the coupons for interest on said Debentures due on February 1, 1931 and all subsequent interest dates, and, at the time of the institution of this suit, the complainants were, and at all times since have been and now are, the holders and owners of said Debentures and coupons.

17. On August 1, 1931, National Radiator made default in payment of the interest then falling due on all the Debentures issued and outstanding as aforesaid, although the [fol. 431] coupons or some thereof appurtenant to said Debentures were duly presented for payment and payment duly demanded.

18. Shortly before October 5, 1931, the complainants, as the holders and owners of coupons representing interest on the Debentures due February 1, 1931, in the aggregate amount of not less than $283,920, and as the holders and owners of coupons representing interest on the Debentures due August 1, 1931, in the aggregate amount of not less than $283,920, duly presented all of said coupons for payment at the place specified for the payment thereof and duly demanded of National Radiator payment thereof in full and National Radiator made default in the payment of all of said coupons and the interest thereby represented and omitted and refused to pay the same or any part thereof, and National Radiator was therefore at the time of the institution of this suit indebted to the complainants on account of said coupons and the interest thereby represented in an amount not less than $567,840, together with interest thereon, and no part of said sum has been paid and no bond or other security has been given for the payment thereof.

19. After National Radiator had made default in the payment of interest on the Debentures as aforesaid, the

holders of more than one-fourth in principal amount of the Debentures then and now outstanding requested Bankers Trust to take all steps needful for the protection and enforcement of the rights of the holders or registered owners of the Debentures, whether by judicial proceedings or otherwise, and Bankers Trust, pursuant to said request, [fol. 432] did thereafter demand payment of said instalments of interest, and no part thereof being paid, did, with the leave of this Court first obtained, in its own name and as trustee of an express trust, commence an action in assumpsit in this Court against the defendant, entitled "Bankers Trust Company, Trustee, Plaintiff, vs. National Radiator Corporation, Defendant, No. 6776 Law" and in said action obtained judgment on October 13, 1931, against National Radiator in the amount of $713,944.38 for the instalments of interest due February 1, 1931 and August 1, 1931, respectively, on all of the Debentures then and now outstanding, with interest.

20. On or about December 24, 1931, acting under the provisions of Section 2 of Article V of the Indenture, Bankers Trust did, pursuant to the written request of the holders of more than one-fourth in principal amount of the outstanding Debentures, duly declare the principal of and interest on all the Debentures outstanding to be immediately due and payable, and upon such declaration the same did become forthwith due and payable.

21. The principal of and interest upon the outstanding Debentures having become immediately due and payable as aforesaid, and National Radiator having defaulted in the payment of the same on due presentation for payment of certain of the Debentures, Bankers Trust did, pursuant to the request of the holders of more than one-fourth in principal amount of the Debentures then and now outstanding, demand payment of said principal and interest, and no part thereof being paid, did in its own name and as [fol. 433] trustee of an express trust, with the leave of this Court first obtained, commence an action in assumpsit in this Court against National Radiator, entitled "Bankers Trust Company, Trustee, Plaintiff, vs. National Radiator Corporation, Defendant, No. 6851 Law" and in said action obtained judgment on December 30, 1931 against National Radiator in the sum if $10,948,597.33, for the $10,673,000

principal amount of Debenture outstanding, with interest on said Debentures from August 1, 1931 to December 24, 1931, in the sum of $275,597.33, plus $11,698.50 representing interest on said total sum of $10,948,597.33 from December 24, 1931 to the date of said judgment making the total amount of said judgment $10,960,295.83.

22. Since the institution of this suit, additional Debentures have been deposited with Bankers Trust, as Depositary under the Plan and Agreement.

Of the $10,673,000 principal amount of Debentures outstanding as aforesaid, $10,188,500 principal amount, at or prior to March 3, 1932, had been deposited with Bankers Trust, as Depositary under the Plan and Agreement, together with the appurtenant coupons for interest due on February 1, 1931 and all subsequent interest dates, and the complainants in this cause are now the holders and owners of said Debentures and coupons. The remaining $484,500 principal amount of Debentures were, on March 3, 1932, outstanding in the hands of divers persons other than the complainants in this cause.

The coupons appertaining to said $484,500 principal amount of Debentures for the interest due on February 1, [fol. 434] 1931 and all subsequent interest dates, were also outstanding in the hands of divers persons other than the complainants in this cause, except that the February 1, 1931 and the August 1, 1931 coupons pertaining to $68,000 principal amount of Debentures have been paid and retired by reason of the facts hereinafter set forth. On October 9, 1931, the date of the appointment of the Receivers, National Radiator had on deposit with said First National Bank of Cincinnati, the sum of $10,000. Said First National Bank refused to pay said sum over to the Receivers, on their demand, claiming an offset equal to the full amount of said deposit, by reason of the fact that it (said First National Bank) was the holder of $68,000 principal amount of Debentures and of the appurtenant coupons representing unpaid instalments of interest on said Debentures, in the sum of $2,210 due February 1, 1931 and the sum of $2,210 due August 1, 1931. On December 8, 1931, the United States District Court for the Southern District of Ohio, by order entered in the ancillary cause there pending between the parties hereto, adjudged that the amount of

said overdue interest coupons was a valid offset as claimed by said First National Bank, but that said Bank was not entitled to any offset on account of the principal of said Debentures, and ordered said First National Bank to deliver to the Receivers said unpaid coupons aggregating $4,420 and to retain for its own account a like amount of said deposit, and to pay to the Receivers the remainder of said deposit, to wit, the sum of $5,580. Said coupons have been delivered to the Receivers, and said sum of $5,580 has been paid to the Receivers by said First National Bank, [fol. 435] pursuant to said adjudication and order, and said sum of $4,420 has been retained by said First National Bank and applied by it, by way of offset, to the payment of said coupons.

23. By reason of the matters and things hereinbefore stated, there are now due and payable to Bankers Trust, as Trustee and/or judgment creditor, the following:

First. A reasonable compensation to Bankers Trust, as Trustee, its agents, attorneys and counsel, and all expenses, liabilities and advances made or incurred by Bankers Trust under the Indenture, all in such amount as may be approved by this Court;

Second. The amount of the judgment hereinabove in Section 19 referred to	$713,944.38
Less the amount included therein in respect of the $4,420 of coupons which have been retired as hereinabove in Section 22 recited, and interest thereon	4,548.69
	$709,395.69
Interest at the rate of 6% per annum on said $709,395.69 from October 13, 1931 to the date of this Decree	27,311.73
[fol. 436] The amount of the judgment hereinabove in Section 21 referred to	10,960,295.83
Interest at the rate of 6% per annum on said $10,960,295.83 from December 30, 1931 to the date of this Decree	279,487.54
Total	$11,976,490.79

Article IV

National Radiator's Assets and Liabilities

24. On January 2, 1932, the Receivers filed with this Court their inventory of the assets and property of National Radiator as the same were constituted on October 9, 1931, the date of the appointment of the Receivers.

25. Apart from the amounts hereinbefore found to be due and payable under the Indenture and the above mentioned judgments, claims of creditors against National Radiator, which have been duly presented as above provided and which have been or shall be proved and allowed as valid obligations of National Radiator, are and will be due and payable as established and allowed. At the time of the filing of the Bill, National Radiator was and still is indebted to creditors other than Bankers Trust and the holders of Debentures, in the total principal amount of approximately $157,511.89, all of whom, with minor exceptions, are unsecured creditors.

[fol. 437] 26. At the time of the filing of the Bill, National Radiator had and still has no means at hand with which to meet, pay or satisfy the interest charges on the Debentures which had become due and payable on February 1, 1931, and August 1, 1931, without seriously jeopardizing the ability of National Radiator to continue its business and without making it difficult for it to secure necessary supplies, materials and labor to continue the operations of its plants and the sale of its products; and the cash and other immediately realizable assets of National Radiator are wholly insufficient for the payment of the indebtedness of National Radiator now due, and National Radiator is presently unable to pay or obtain an amount sufficient for the payment of the indebtedness now due and owing by it. The unity of the property of National Radiator and its integrity as a whole, as now held and operated, the administrative, technical and sales organization and the goodwill of its customers, constitute, however, most important elements of value. If the properties and assets of National Radiator were sold under separate levies by its creditors, the net proceeds thereof would in all probability be wholly inadequate to pay and satisfy its obligations. But continuation of the receivership (except until such time as a sale

of National Radiator's property can be effected) cannot produce results sufficiently favorable to justify its continuance. The property, assets and business of National Radiator should, therefore, be administered and sold in such manner as to realize the highest price obtainable. The interests of the creditors of National Radiator will best be served by the speedy sale of all its property, assets and business, in such a manner as to give an opportunity for [fol. 438] the purchase of the whole thereof as an entirety, and the distribution, under the direction of this Court, of the net proceeds of such sale amongst the creditors of National Radiator and such others, if any, as this Court may adjudicate.

27. This Court specially finds that this cause was instituted and has been prosecuted by the complainants and Bankers Trust, as Trustee, and that the answer of National Radiator admitting the truth of the allegations of the Bill and joining in the prayers thereof and consenting to the appointment of the Receivers was filed, in good faith, for the purpose of conserving the property, assets and good will of National Radiator and of effecting the sale thereof for the benefit of all creditors of National Radiator, and there is no evidence of any fraud or collusion on the part of the complainants, or of Bankers Trust or of National Radiator in connection with any of the proceedings herein.

28. This Court, upon consideration of the foregoing, also concludes that the complainants and Bankers Trust, as Trustee and judgment creditor, are legally entitled to a sale pursuant to this Decree of all of the property, assets and business of National Radiator, as prayed for in the Bill and in said Intervening Petition of Bankers Trust.

It is therefore further ordered, adjudged, and decreed as follows:

Article V

Payment of Indebtedness Decreed

29. National Radiator, or someone on its behalf, shall within 10 days after the entry of this Decree, pay or cause [fol. 439] to be paid to Bankers Trust, as Trustee and judgment creditor, for the use and benefit of the holders and registered owners of the Debentures now outstanding and

the coupons thereunto appertaining, the sum of $11,976,490.79 with interest thereon at the rate of 6% per annum from the date of this Decree to the date of such payment.

Article VI

Sale of Property Decreed

30. If the payment hereinabove in Section 29 decreed is not made within said 10-day period, all property and interests in property of every kind, character and description of National Radiator and/or the Receivers, real and personal, movable and immovable, vested and contingent, in law or in equity, tangible and intangible, held and to be held or acquired by National Radiator and/or the Receivers, wheresoever situated and to which National Radiator and/or the Receivers is or are or may become entitled, including, without limiting the generality of the foregoing description, all the business, good-will, including corporate name, patents, trade names, trade marks, bills and accounts receivable, choses in action and cash on hand or in banks, shall be sold in the manner and subject to the provisions hereinafter in this Decree set forth, without valuation, appraisement, exemption or extension and free from any right of redemption, and all the right, title and interest and equity of redemption of National Radiator and of its creditors and stockholders and of the Receivers and of all persons claiming under it or them or any of them [fol. 440] and of all parties to this cause, in and to said property and every part and parcel thereof, shall be forever barred and foreclosed and the entire property and assets of National Radiator shall be administered, and the rights, liens and equities of the creditors of National Radiator, are decreed, and shall be enforced, all as hereinafter provided.

If such payment shall be made as hereinabove in Article V decreed, any of the parties to this cause, or any person or persons making any such payment or payments, may apply to this Court for such further instructions and for such further order or decree with reference to relief from the operation of the decree of sale herein contained and otherwise, as may be just and equitable.

31. The property owned by National Radiator and/or the Receivers which is to be sold under this Decree is more particularly described in Schedule A hereto annexed.

32. The property by this Decree directed to be sold, whether sold as an entirety or in parcels, shall be sold subject to the lien of taxes and assessments lawfully levied or assessed against the same and unpaid, and subject to the lien or charge of any lawful mortgage, pledge or other encumbrance thereon heretofore made or given by any person, firm or corporation, including National Radiator and the Receivers.

33. The sale directed by this Decree shall be made at public auction to the highest bidder, in the manner hereinafter directed. It shall be made by and under the direction of the Receivers and may be made by them in per- [fol. 441] son or by their duly appointed agent. The sale directed by this Decree shall be made at the County Court House in the City of New Castle in the County of Lawrence in the Commonwealth of Pennsylvania, on a day and at an hour to be named by the Receivers, on request of the solicitor for the complainants. Notice of the time, place and terms of sale, containing a brief and general description of the property to be sold, and referring intending purchasers for a more particular description of such properties and of the terms of sale to this Decree and to the records in this cause, shall be published once in each week for 4 successive weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in each of the cities herein named, towit: New York, N. Y.; Buffalo, N. Y.; Boston, Mass.; Baltimore, Md.; Washington, D. C.; Richmond, Va.; Trenton, N. J.; Pittsburgh, Pa.; Johnstown, Pa.; Cincinnati, Ohio; Chicago, Ill. Such newspapers shall be selected by the solicitors for the complainants. Such notice shall be sufficient if substantially in the form set forth in Schedule B hereto annexed. If and to the extent that this Decree shall be adopted by the order or decree of any other court or courts, reference to such order or decree of such other court or courts, may be incorporated in said notice. The first publication may be made on the first day after the entry of this Decree or on any day thereafter. Said notice, when so published, shall constitute due, timely and sufficient notice to all persons of said sale and of the hearing on the report of the Receivers of the result of said sale. The Receivers shall have power to adjourn said sale from time to time to any [fol. 442] future date, by oral announcement of such ad-

journment, made either personally or by some person designated by them to act in their name or by their authority, at the time and place appointed for the sale or for such adjourned sale, and the Receivers may, without further notice, advertisement or publication, proceed with such sale at the time to which the same shall have been so adjourned, but they may give any such further notice of sale, in addition to the notice herein directed, or of any adjournment, as may be requested by the solicitors for the complainants, or as this Court may order.

As soon as may be after any sale, the Receivers shall report the result of such sale to this Court, and from time to time thereafter shall make such further and supplemental reports as may be necessary or desirable to keep this Court and the parties to this cause properly advised of their proceedings and the execution of this Decree.

34. The tenth day following any such sale at 10:30 o'clock in the forenoon, or if said day be a Sunday or legal holiday, then the next day not a Sunday or legal holiday, is hereby fixed as the time when, and Room 301 in the Post Office Building in the City of Pittsburgh, Pennsylvania, is hereby fixed as the place where, this Court shall receive the report of the result of such sale and consider the entry of such further orders, judgments or decrees as may by this Court be deemed proper and advisable; and this Court reserves the right at said time either to adjourn the hearing upon such report of the Receivers or at said time or at any other time to which said hear-
[fol. 443] ing may be adjourned, to order the confirmation or disapproval of said rule, to order such further and other sale, if any, as may be deemed advisable, to hear complaints upon the matters referred to in Section 36 of this Decree and to make such orders in the premises as it may deem proper. This cause is hereby set for further hearing before this Court at the time and place of the making of the above directed report to this Court, and notice that such hearing will then and there be had shall be included in the notice of sale to be published as hereinbefore in Section 33 directed and announcement thereof shall be made by the Receivers at the time of such sale. Such hearing may thereupon be had without any further notice to any party.

Article VII

Manner of Sale—Parcels in Which Property is to be Sold. Acceptance of Bids

35. The sale directed by this Decree shall be made in the manner hereafter in this Section prescribed, and all bids for any Parcel of the property to be sold shall be received and noted only on condition that such Parcel may be subsequently offered and sold as in this Section provided.

A. The Receivers shall first offer for sale separately and as an entirety, as Parcel A, the property described in Clause I of Schedule A annexed to this Decree, and shall note the highest bid therefor.

B. The Receivers shall next offer for sale separately and as an entirety, as Parcel B, the property described in [fol. 444] Clause II of Schedule A annexed to this Decree, and shall note the highest bid therefor.

C. The Receivers shall next offer for sale separately and as an entirety, as Parcel C, the property described in Clause III of Schedule A annexed to this Decree, and shall note the highest bid therefor.

D. The Receivers shall next offer for sale separately and as an entirety, as Parcel D, the property described in Clause IV of Schedule A annexed to this Decree, and shall note the highest bid therefor.

E. The Receivers shall next offer for sale separately and as an entirety, as Parcel E, the property described in Clause V of Schedule A annexed to this Decree, and shall note the highest bid therefor.

F. The Receivers shall next offer for sale separately and as an entirety, as Parcel F, the property described in Clause VI of Schedule A annexed to this Decree, and shall note the highest bid therefor.

G. The Receivers shall next offer for sale separately and as an entirety, as Parcel G, the property described in Clause VII of Schedule A annexed to this Decree, and shall note the highest bid therefor.

H. The Receivers shall next offer for sale separately and as an entirety, as Parcel H, the property described in Clause VIII of Schedule A annexed to this Decree, and shall note the highest bid therefor.

[fol. 445] I. The Receivers shall next offer for sale separately and as an entirety, as Parcel I, the property described in Clause IX of Schedule A annexed to this Decree, and shall note the highest bid therefor.

J. The Receivers shall next offer for sale separately and as an entirety, as Parcel J, the property described in Clause X of Schedule A annexed to this Decree, and shall note the highest bid therefor.

K. The Receivers shall next offer for sale Parcels A, B, C, D, E, F, G, H, I and J, together as an entirety, as Parcel K, and shall note the highest bid therefor.

If the highest bid noted for Parcel K shall equal or exceed the aggregate of the highest bids for said property when offered for sale in separate parcels, as provided in the foregoing Paragraphs A to J, inclusive, then the bids noted for Parcels A, B, C, D, E, F, G, H, I and J shall be cancelled by the Receivers and said bid noted for Parcel K shall be accepted. Otherwise, the bid noted for Parcel K shall be cancelled and the highest bids noted for Parcels A, B, C, D, E, F, G, H, I and J shall stand and be accepted by the Receivers, and said several parcels shall be struck off and sold to the highest bidders for said respective Parcels.

In that event that no separate bid at least equal to the required minimum amounts prescribed in Section 38 of this Decree shall have been noted for some one or more of said several Parcels, then, for the purposes of this Section, it shall be deemed that there has been bid for each such Parcel for which no such bid was noted, the minimum [fol. 446] amount required by Section 38 of this Decree to be bid for such Parcel.

In case a separate sale of any of the Parcels above mentioned shall be directed to be made by an order of any of the above mentioned courts in which ancillary causes are pending, as hereinabove in Section 8 recited, this Decree shall be deemed to be modified to the extent that the provisions of said order relating to the separate sale of such

Parcel are inconsistent with the provisions of this Decree.

This Court reserves the right to make such further orders and decrees as may be necessary or proper to carry the foregoing provisions into effect and further expressly reserves the right not to confirm any sale made as provided in this Decree and to accept or reject any bid or bids which may be made at any such sale.

Article VIII

Bidder's Statement, Deposit Required to Qualify Bidders, and Upset Prices

36. The Receivers shall refuse to receive any bid from anyone who shall not, at least 24 hours before the offer for sale by the Receivers of the property to be sold, file with the Receivers a statement as to whether or not he proposes to bid for the purposes of any plan or agreement of reorganization and, if so, the further statement that there has been filed with the Clerk of this Court, and entitled in this cause, a petition duly verified for the approval by this Court of said plan or agreement of reorganization in the event that the bidder becomes the suc- [fol. 447] cessful bidder at the sale directed by this Decree, together with a complete copy of such plan or agreement and a complete statement of the notice theretofore given of such plan or agreement, by publication or otherwise, to persons and corporations interested in National Radiator and its property; provided, however, that, if any bidder's bid is made for the purposes of the Plan and Agreement hereinabove in this Decree referred to, such bidder's statement need not include a copy of said Plan and Agreement.

At the hearing to be held upon the report of the Receivers referred to in Section 34 hereof, this Court will hear complaints as to the equity of the provisions of any such plan or agreement of reorganization, including the Plan and Agreement hereinabove referred to, affecting the respective priorities of all persons and corporations interested in National Radiator and its property, from all Debentureholders or other creditors, secured or unsecured, of National Radiator, who before the date of such hearing shall file, with leave of Court, their petitions herein for such purpose, specifying in reasonable detail the particulars in which such plan or agreement is alleged by them to

be inequitable, and this Court reserves exclusive jurisdiction to determine whether the provisions as to which complaints are so made are equitable; and no sale of any property hereunder to any purchaser who is to purchase said property for the purposes of any such plan or agreement of reorganization shall be confirmed if this Court shall, after such hearing, determine that the provisions of such plan or agreement of reorganization, or any thereof, are [fol. 448] inequitable or that said plan or agreement of reorganization does not provide an equitable and timely offer of participation in the reorganization thereby proposed to all persons entitled thereto. The Receivers' notice of sale shall refer to the foregoing provisions of this paragraph; and if any person or persons who shall have filed with the Receivers a statement that he or they propose to bid for the purposes of any plan or plans or agreement or agreements of reorganization, as aforesaid, shall be the successful bidder or bidders for said property, the Receivers shall publish once in the same newspapers in which they shall have published the notice of sale, a notice that the successful bidedr or bidders, as the case may be, have filed as aforesaid such statement with a copy of the plan or agreement of reorganization for the purposes of which their successful bid or bids were made and that such copy of said plan or agreement of reorganization may be examined by anyone wishing to do so at the office of the Clerk of this Court. Such publication shall give notice of the time and place where the hearing hereinbefore provided for upon the equity of the provisions of such plan or agreement of reorganization shall be held. The aforesaid publications shall be made as hereinabove provided and shall be completed at least 5 days before such hearing, and when so made shall constitute due, timely and sufficient notice of the hearing on any such plans and agreements. All persons who shall fail to make any complaint at said hearing as hereinabove provided, shall be barred from doing so thereafter.

37. In making the sale directed by this Decree, the Receivers shall refuse to receive any bid from any person offering to bid who shall not, at least 24 hours prior to any [fol. 449] such offering by the Receivers for sale under this Decree, deposit with the Receivers and deliver to them as a pledge that he will make good his bid and as part payment

of the purchase price in case of the acceptance of his bid (a) a sum in cash or check or checks of or certified by some bank or trust company in New York, N. Y., Pittsburgh, Pa., Chicago, Ill., or Boston, Mass., acceptable to the Receivers, and made or endorsed payable to their order, equal to at least 10% of the minimum amount specified in Section 38 of this Decree in respect of the Parcel for which such person is offering to bid, or (b) Debentures in bearer form and/or coupons thereon due February 1, 1931 and/or August 1, 1931 and/or assignments of claims against National Radiator then finally established and allowed, aggregating in amount at least 40% of such minimum amount specified in said Section 38, or (c) partly cash and/or certified check or checks and partly Debentures and/or coupons and/or assignments of claims, in the same relative proportions. Any person offering to bid for two or more Parcels shall make a separate deposit as aforesaid with respect to each such Parcel for which he offers to bid, or make one or more deposits equal to the aggregate of such separate deposits. A deposit made to qualify any person to bid for Parcel K will also qualify such person to bid separately for one or more of Parcels A to J, inclusive.

In lieu of such deposit, the Receivers may accept the certificate or certificates of any bank or trust company acceptable to them, that it holds, subject to their order, cash, checks, Debentures, coupons and/or assignments of claims, [fol. 450] all of the character above specified.

Any deposit received from an unsuccessful bidder shall be returned to him at the conclusion of the bidding, but without interest thereon. The deposit received from a successful bidder shall be applied on account of the purchase price of the property purchased by such bidder in case the sale to him shall be confirmed, and in case this Court shall deny confirmation of the sale to a successful bidder, his deposit shall be returned to him on his demand therefor, but without interest thereon.

In case a successful bidder, after confirmation of the sale to him as hereinafter in this Decree provided, shall fail to comply within the period of 20 days after the entry thereof with any order of this Court requiring or relating to the payment of the balance of the purchase price, or if an appeal be taken from such order, within the period of 20 days after the service of notice of the entry of the order

finally affirming such order on appeal, then the deposit of such bidder shall be forfeited as a penalty for such failure and shall be applied to the payment of the expense of a re-sale and toward making good any deficiency or loss in case the property sold to such bidder shall be sold at a less price on any such resale, and to such other purposes as this Court may direct.

38. The Receivers shall not receive any bid for any Parcel of the property in and by this Decree directed to be sold less than the respective minimum amounts hereinafter set forth:

[fol. 451] Parcel A	$2,392,000
Parcel B	28,000
Parcel C	17,500
Parcel D	37,500
Parcel E	17,500
Parcel F	1,000
Parcel G	2,250
Parcel H	1,000
Parcel I	1,000
Parcel J	2,250
Parcel K	2,500,000

When the property by this Decree directed to be sold is offered for sale by Receivers, if a bid of at least the above required minimum amount shall not be received for any of said Parcels, then the Receivers shall adjourn the sale of such Parcel or Parcels to such date as they shall determine and announce at the time of adjournment, and thereupon they shall apply to this Court for further instructions. If a bid or bids of at least the above-required respective minimum amounts shall be received and noted for any one or more of said Parcels as hereinbefore provided, then such bid or bids, as provided in Section 35 of this Decree, shall be accepted and said Parcel or Parcels shall be struck off and sold as in said Section 35 provided.

39. Any party to this cause or any owner or holder of Debentures or of any of the coupons thereon or of any claim against National Radiator, or anyone else, may bid at the sale and, if the successful bidder, may purchase in his or its own right.

40. Any successful bidder may assign, transfer and set over his bid in whole or in part and all or any part of his [fol. 452] rights or interest under this Decree as such successful bidder; provided, however, that the assignee shall assume the successful bidder's obligation to perform all the terms and conditions of the sale.

Article IX

Purchaser to Assume and Pay Certain Expenses, Compensations and Liabilities

41. The word "Purchaser", wherever used in this Decree, shall include the plural as well as the singular, and is intended to designate the person or persons, firm or firms, corporation or corporations, to whom or to which the sale of any property covered by this Decree shall have been confirmed by order of this Court herein, and his, its or their successors and assigns.

42. The Purchaser of Parcel A of the property (whether sold separately or as a part of Parcel K), in addition to the amount of his accepted bid for said property and as part consideration for said property and as part of the purchase price thereof, shall be required to assume all obligations of the Receivers under any then existing executory contracts, leases and agreements entered into, assumed or adopted by the Receivers.

The Purchaser of Parcel A shall take the property, and shall receive the deed or deeds or other instrument or instruments of conveyance or assignment and transfer hereinafter provided to be given to the Purchaser, subject to the express condition that the Purchaser shall perform the [fol. 453] obligations hereinbefore required to be assumed by the Purchaser of said Parcel, to the extent that such obligations have not theretofore been fully performed and made, and this Court expressly retains jurisdiction of the property so purchased, as against all other provisions of this Decree, and reserves the right to re-take said Parcel and apply it to the satisfaction of said obligations in case the Purchaser shall fail to comply with any order of this Court directing such performance within 20 days after the service of a copy of such order, or, if an appeal be taken from any such order, within 20 days after service of written notice of the final affirmance of such order upon appeal.

Article X

Payment by the Purchaser

43. Upon confirmation of the sale by this Court, the Purchaser shall make such further payment or payments on account of the purchase price of the property sold to him as this Court may from time to time direct; provided, however, that at the time of the assignment, transfer and delivery to the Purchaser of the property and cash comprised in Parcel A, the Receivers shall retain out of said cash the sum of $300,000, and the retention of said sum by the Receivers shall be deemed to constitute the payment in cash by the Purchaser of Parcel A of a like portion of the purchase price, and said sum shall be treated as a portion of the proceeds of the sale of said Parcel A, to be applied as provided in Section 48 of this Decree.

[fol. 454] The purchase price may be paid in cash or the Purchaser may satisfy any residue of his bid, in whole or in part, by turning over to the Receivers, at their distributive value to be credited and returned as hereinafter in this Decree provided, Debentures in bearer form and/or coupons thereon due February 1, 1931 and/or August 1, 1931, and/or assignments of claims against National Radiator then finally established and allowed.

In lieu of Debentures and/or coupons and/or assigned claims, the Receivers may accept the certificate or certificates of any bank or trust company in New York, N. Y., Pittsburgh, Pa., Chicago, Ill., or Boston, Mass., acceptable to them, that it holds, subject to their order, such Debentures and/or coupons and/or assignments of claims against National Radiator finally established and allowed.

The Purchaser shall not be required to pay on account of the purchase price any amount thereof which may be payable in cash out of the proceeds of the sale to Bankers Trust or to any holder of Debentures or coupons thereon or to any other creditor of National Radiator until 10 days after this Court shall, on application of Bankers Trust or such Debentureholder or couponholder or other creditor, direct payment of the cash distributive share of such proceeds to which Bankers Trust or such Debentureholder or couponholder or other creditor shall be entitled.

44. The Purchaser shall be credited on account of his purchase price for Debentures and coupons and assigned claims finally established and allowed, turned over in part [fol. 455] payment of the purchase price, with such sum as would be paid in respect of such Debentures, coupons and assigned claims out of the proceeds of sale, if the whole amount of the purchase price had been paid in cash.

After this Court has determined the amount of the purchase price of the property directed by this Decree to be sold with which the Purchaser is to be credited on account of the Debentures, coupons and assigned claims which the Purchaser has turned over to be credited on his purchase price, and after the Purchaser has completed payment of the purchase price or has complied with the conditions of any order of this Court providing for the return to him of such Debentures, coupons and assigned claims before the payment in full of the purchase price, the Receivers shall return the same to him, noting thereon, by stamping or otherwise, the amount of the purchase price with which the Purchaser is to be credited with respect to each such Debenture, coupon and assigned claim.

45. This Court reserves a lien and charge upon the property sold to any Purchaser, subordinate only to the right reserved by Section 42 and the liens mentioned in Section 32 of this Decree, for the payment in full of the purchase price thereof and the right to re-sell the property, or any part thereof, upon such notice as it may direct, at the risk and cost of the Purchaser, in case the Purchaser shall fail or omit to make any payment on account of such purchase price within 20 days after the entry of the order requiring [fol. 456] such payment, or if an appeal be taken from any such order, within 20 days after the service of written notice of the final affirmance of such order upon appeal.

46. All sums of money, checks, Debentures, coupons, assigned claims or certificates of deposit therefor received by the Receivers in connection with the qualification of bidders and on account of the payment of the purchase price of the property sold under this Decree shall be deposited by the Receivers in such bank or banks, trust company or trust companies in the City of Pittsburgh, Pa., or in the City of New York, N. Y., or in both of said cities, as shall be approved by the solicitor for the complainants and the

solicitor for Bankers Trust, to be held subject to the order of this Court in this cause.

47. The Purchaser shall not be required to see to the application of the purchase moneys nor be answerable in any manner whatsoever for any loss, mis-application or non-application thereof or of any part thereof.

Article XI

Application or Proceeds of Sale

48. The proceeds of sale of the property by this Decree directed to be sold shall be applied as follows:

First. To the payment of

(1) all administration expenses, allowances and disbursements in this cause, including the expenses attendant upon the sale of the property directed by this Decree to be [fol. 457] sold, and any unpaid compensation which has been or shall be allowed to the Receivers in this cause and in the causes referred to in Sections 8 and 9 of this Decree or any of them and all expenses incurred by the Receivers and by Robert H. Richards, Jr., as one of the receivers in the cause mentioned in Section 9 of this Decree, in the discharge of their duties after the delivery of the possession of the property sold;

(2) the compensation and disbursements of the complainants and of their solicitors, and of National Radiator and its solicitors, and of the solicitors for the Receivers in this cause;

(3) the compensation of Bankers Trust, as Trustee under the Indenture, its agents, attorneys and counsel and all expenses, liabilities, and advances made or incurred by it as such Trustee;

(4) all unpaid indebtedness and liabilities of the Receivers in this cause and in the causes mentioned in Section 8 of this Decree and of Robert H. Richards, Jr., as one of the receivers in the cause mentioned in Section 9 of this Decree, contracted or incurred in the management or operation of the property in their possession or otherwise in the discharge of their duties as receivers, or in compliance

with any orders of court in any of said causes up to the date of delivery of possession of the property sold;

(5) the compensation of Robert H. Richards, Jr., as one of the receivers appointed as aforesaid by the Court of Chancery of the State of Delaware in the cause therein [fol. 458] pending and the compensation and disbursements of the solicitors for the complainants, for National Radiator and for the receivers appointed in said cause, in such amounts as shall be finally allowed said Robert H. Richards and said solicitors by order of said court in said cause; and

(6) the compensation and disbursements of the solicitors for the complainants, for Bankers Trust, for National Radiator and for the Receivers in the several ancillary causes mentioned in Section 8 of this Decree, in such amounts as shall be finally allowed said solicitors by orders of the respective courts in which said causes are pending as aforesaid.

Second. To the payment of such obligations of National Radiator as this Court shall direct at the times and in the manner directed by this Court in its order of distribution to be entered upon or after the entry of its order confirming the sale herein directed to be made, and this Court reserves exclusive jurisdiction to make such order and to pass upon and determine all questions which may be presented to it in accordance with its practice relating to the validity and to the amount and priority of the claims of any person claiming to be entitled to share in the proceeds of sale.

Except as in this Decree otherwise provided, all matters and questions relating to any of the above mentioned indebtedness, obligations, compensation, fees, allowances and expenses and all payments to be made therefor, shall from [fol. 459] time to time be determined fixed, allowed and settled by this Court upon application by the respective persons claiming to be entitled to receive such payments, and this Court reserves the right and retains the exclusive jurisdiction so to do.

Article XII

Appearance of Purchaser

49. The Purchaser of any property sold by this Decree shall have the right to enter his appearance in this cause

and he, or any of the parties to this cause, shall have the right to contest any claim, demand or allowance pending at the time of the sale and then undetermined, and any claim, demand or allowance which would be payable by such Purchaser, or which would be chargeable against the property sold to such Purchaser, in addition to the amount bid at the sale, and he or any such party may appeal from any decision relating to any such claim, demand or allowance.

Article XIII

Disallowance of Unfiled Claims and Injunction

50. Notice having heretofore been given pursuant to Order No. 7 entered in this cause October 23, 1931, requiring all creditors of National Radiator to file statements of their claims and demands against National Radiator with the Receivers on or before December 31, 1931, and said Order No. 7, having been duly adopted by appropriate orders entered in all of the ancillary causes hereinabove in Section 8 referred to, and the time for such filing having heretofore expired, all claims and demands against Na- [fol. 460] tional Radiator, statements whereof have not been filed on or before December 31, 1931 (except any claims or demands which have arisen or may arise after October 9, 1931, and/or which may thereafter be proved nunc pro tunc by permission of this Court and be allowed after said date or which have been or may hereafter be allowed by order of this Court without requiring the filing of statements thereof) shall be finally barred and foreclosed, and no such claim so barred or foreclosed shall be enforced against the Receivers or against any assets in the hands of the Receivers or against any of the property sold, or any portion thereof, and no holder of any such claim or demand shall be entitled to any right whatsoever under this Decree, nor shall any such claim or demand be entitled to share in the distribution of any of the proceeds of sale of the property directed by this Decree to be sold.

51. All creditors and stockholders of and claimants against National Radiator are hereby severally and respectively perpetually enjoined from prosecuting against the Purchaser of any property by this Decree directed to be sold, or against any nominee or assignee or grantee of such

Purchaser, or against any person or persons, corporation or corporations claiming by, under or through them, or any of them, or against any of the property sold pursuant to this Decree, any suit or proceeding arising out of or based on any obligation or liability of National Radiator, or otherwise to impose liability upon the Purchaser or upon any nominee or assignee or grantee of the Purchaser or upon any party to this cause or upon any person or persons, cor- [fol. 461] poration or corporations, claiming by, under or through them or any of them, or upon any property sold pursuant to this Decree in respect of any claim against National Radiator, or to charge the Purchaser, or any nominee or assignee or grantee of the Purchaser, or any party to this cause, or any person or persons, corporation or corporations claiming by, under or through them or any of them, or any property sold pursuant to this Decree, with any liability on or in respect of any matter adjudicated by this Decree, except pursuant to the provisions of and in subordination of this Decree; provided, however, that nothing herein contained shall be deemed to limit or restrict (a) the right of any such claimant whose claim, or any part thereof, is payable under the provisions of this Decree, as part of the purchase price of the property sold hereunder or out of the proceeds of sale of said property, or any part thereof, to take herein such proceedings in respect thereof as may be authorized or permitted by this Decree; or (b) the right of the holder of any lien or charge subject to which the property of National Radiator is to be sold, to enforce such lien or charge; and provided, also, that if any Purchaser of the property by this Decree directed to be sold assumes or adopts any of the obligations of National Radiator, the failure of any holder of any obligation so assumed or adopted to file a statement of his claim with the Receivers as hereinabove recited shall not relieve such Purchaser from liability upon the obligation so assumed or adopted by him.

[fol. 462] Article XIV

Confirmation of Sale and Receivers' Deeds

52. Upon confirmation of the sale by this Court and upon payment by the Purchaser of the purchase price of the

property sold to him (including the assumption by the Purchaser of the obligations by him to be assumed as hereinabove in Section 42 provided) or of such portion of the purchase price as, pursuant to the provisions, if any, of the order of this Court confirming the sale, shall entitle the Purchaser to receive delivery of a deed or deeds or other instrument or instruments of conveyance or assignment and transfer, the Receivers shall execute and deliver a deed or deeds or other proper instrument or instruments conveying or assigning and transferring to such Purchaser or his assigns the property sold to him; and to the Purchaser of Parcel A (whether sold separately or as a part of Parcel K) the Receivers shall assign, transfer and deliver all cash (less the sum of $300,000 to be retained by the Receivers as hereinabove in Section 43 provided), and all current assets, materials and supplies then in the possession of the Receivers.

National Radiator shall, at the time of the delivery of any deed or deeds or other instrument or instruments of conveyance or transfer and assignment by the Receivers, and by way of further assurance, make and deliver a similar deed or deeds or other instrument or instruments of conveyances or assignment and transfer to the grantee or grantees named in such deed or deeds or other instrument or in- [fol. 463] struments of conveyance or assignment and transfer by the Receivers, or if any such Purchaser or his assigns shall so request, shall join with the Receivers in the execution of the deed or deeds or other instrument or instruments of conveyance or assignment and transfer to be made by the Receivers, and shall thereby convey, transfer, assign and release to such grantee or grantees all its right, title and interest in and to the property so conveyed or assigned and transferred by the Receivers.

Upon the production of said deed or deeds or other instrument or instruments of conveyance or assignment and transfer or of a certified copy or copies thereof, the grantee or grantees therein shall be let into the possession of the property so conveyed or assigned and transferred and shall, after such delivery of possession, hold, possess and enjoy the property so conveyed or assigned and transferred and every part and parcel thereof, free from any lien, charge or claim, except those subject to which this Decree ex-

pressly declares the property is to be sold, and free from all claims, rights, interest or equity of redemption of, in or to the same by or of National Radiator, its successors and assigns, and by or of its creditors or stockholders and by or of any and all persons claiming by, under or through it, its creditors or stockholders, and by or of any party to this cause; provided, however, that, if the property sold under this Decree shall be sold in separate Parcels as hereinbefore provided, the respective Purchasers of Parcels B to J, inclusive, shall permit the Purchaser of Parcel A to leave on the respective premises comprised in said Parcels [fol. 464] B to J, inclusive, for a reasonable time to be hereafter fixed by this Court and without cost or charge, such inventories, stocks of merchandise and other property comprised in Parcel A as shall be located or stored on such premises at the time of such delivery of possession to the Purchasers of said Parcels B to J, inclusive, and they shall also permit the Purchaser of Parcel A, at all reasonable hours during such time, to enter upon said respective premises and to remove therefrom such inventories, merchandise and other property.

Prior to the delivery of possession as herein provided, the Receivers may continue to operate the properties in receivership and to carry on the business of National Radiator and to use for such purpose the cash, current assets, materials and supplies now or hereafter in the possession of the Receivers.

53. Within 2 weeks after the entry of this Decree, the Receivers shall file in this cause a reasonably itemized and specific schedule of all the property and assets of National Radiator not already fully itemized and specified in their reports heretofore filed in this cause or to be filed herein pursuant to Section 54 of this Decree.

Article XV

Statements of Receivers

54. The Receivers shall, not more than 20 nor less than 10 days prior to the date fixed for the sale under this Decree, file in this cause an approximate statement or statements as nearly correct as they are able to make the same, [fol. 465] and made as of the latest date reasonably practicable showing or containing:

(a) the amounts as estimated by the Receivers of all taxes and assessments lawfully levied or assessed and of all mortgages, pledges and other encumbrances, which the Receivers are informed are claimed to be a lien or charge upon any of the property by this Decree directed to be sold, and specifying in each case the nature of such tax, assessment, mortgage, pledge or other encumbrance, and the particular property upon which the same is claimed to be a lien or charge;

(b) such supplement to the report of the Receivers filed on January 2, 1932, by way of a later balance sheet or otherwise, as will, together with said report of January 2, 1932, show the current assets of the receivership, including cash, and the extent to which any of such assets are pledged or otherwise charged to secure any indebtedness of the Receivers or of National Radiator;

(c) the indebtedness and obligations of the Receivers of every kind, character and description, including a description of all outstanding contracts and leases entered into by the Receivers and indicating which thereof, if any, reserve to the Purchaser under this Decree the right to elect not to assume or adopt the same;

(d) a description of all outstanding contracts and leases to which National Radiator is a party; and also showing whether they have been assumed or adopted or disaffirmed by the Receivers; and

[fol. 466] (e) all claims and demands against National Radiator which have been filed pursuant to any order heretofore entered in this cause, save such as may have been paid and discharged in full, and the amount of such claims and demands which have been allowed.

Such statements and each of them shall be advisory only and shall not, with respect to any matter, be construed as a representation or warranty. Nothing therein contained or omitted therefrom shall be binding upon the Purchaser at such sale or shall release any bidder or the Purchaser at such sale, nor shall such statements or any of them constitute ground for release from any debt, liability or obligation because of anything included therein or omitted therefrom, and the Purchaser at such sale shall be entitled only to such title or interest as the Receivers and/or Na-

tional Radiator have or has power to transfer by virtue of this Decree. None of said statements shall be binding upon any of the parties to this cause or be or be deemed conclusive as to any matters contained herein.

Article XVI

Disaffirmance of Contracts and Rejection of Property by Purchaser

55. Any Purchaser of the property described in this Decree, whether or not he has exercised or used any rights thereunder, shall, subject to the provisions hereinafter specified, within 6 months after the delivery of the deed or deeds or other instrument or instruments of conveyance or assignment and transfer by the Receivers of the prop- [fol. 467] erty purchased by him, or within such additional period as the Court may hereafter by its orders or decrees permit, have the right to elect not to assume or adopt any contract, lease or agreement not fully performed, heretofore made or assumed by National Radiator (but not any contract, lease or agreement entered into, made, assumed or adopted by the Receivers which does not expressly reserve to the Purchaser the right to elect not to assume or adopt such contract, lease or agreement), which is part of the property embraced in such deed or deeds or other instrument or instruments of conveyance or assignment and transfer. Such election shall be made by instrument in writing signed by such Purchaser and shall contain a general description of the contracts, leases or agreements which he elects not to assume or adopt, and shall be filed with the Clerk of this Court within the period aforesaid or within such additional period as this Court may hereafter by its order permit. No user of rights prior to the expiration of said period shall be deemed to conclude the Purchaser in respect of such election, and upon the filing of such election, the Purchaser shall be deemed not to have assumed or adopted said contracts, leases, agreements or rights therein described and not to be bound by the obligations of said contracts, leases or agreements; provided, however, that such election shall not entitle such Purchaser to any reduction in the amount of the bid made at said sale or in the amounts to be paid as in this Decree provided. [fol. 468] Any Purchaser shall also have the right not to

accept any part of the property sold to him under this Decree, by written notice of his election to the Receivers given at any time prior to the execution and delivery of the deed or deeds or other instrument or instruments of conveyance or assignment and transfer by the Receivers or by National Radiator. No such election by the Purchaser shall diminish or affect the purchase price to be paid by him. The deed or deeds or other instrument or instruments of conveyance or assignment and transfer to be given by the Receivers and National Radiator, shall not include any property which the Purchaser shall have so elected not to take or accept.

Article XVII

Matters Reserved

56. All matters not determined by this Decree are reserved by this Court for future determination. This Court further reserves the right and retains exclusive power and jurisdiction by appropriate order or orders hereinafter entered to cause to be delivered to any Purchaser title to and possession of the property by this Decree sold to him, and to hear and determine any and all the controversies as to the character, extent and validity of the title and possession to such property acquired under this Decree or upon the execution thereof. Any party to this cause, or any claimant or other person whose rights are affected or determined by any of the provisions of this Decree, may at any time apply to this Court for such orders and directions touching the matters hereby reserved or for such further or other [fol. 469] relief as this Court may deem just and proper.

For the purposes of this cause, the present Equity Term of this Court is extended until after the complete execution of the provisions of this Decree and of any decree supplementary to or modifying the same, and until after the final determination and disposition of all matters herein reserved for future determination or action by this Court, and said Equity Term is extended in any event for a period of 3 years from the date of this Decree with leave to any party to this cause, at any time prior to the expiration of said period of 3 years to apply to this Court for a further extension of said Term.

Article XVIII

Execution of Decree in Ancillary Jurisdictions

57. As to so much of the subject matter of this Decree as is within the jurisdiction of the courts in which the above mentioned ancillary causes are pending, and as to those matters to be performed by the Receivers in their capacity as ancillary receivers under the terms hereof, this Decree shall be executed and carried into effect in the jurisdictions of said courts only with the concurrence of the said courts and only to the extent to which it shall be concurred in and adopted by said courts. Certified copies of orders and decrees made by said courts in respect of the concurrence in and the adoption of this Decree shall from time to time be filed with the Clerk of the District Court of the United States for the Western District of Pennsylvania. This Court reserves the right from time to time to refer to the [fol. 470] courts having jurisdiction in the ancillary causes such of the matters and things reserved under this Decree as may properly be so referred, and the right from time to time to make such orders or decrees as may be necessary or expedient for the purpose of executing and carrying into effect this Decree in conformity with the terms and intent of any concurring orders and decrees of said courts.

Dated May 31, 1932.

Per Curiam.

G.

And now, to wit, June 9, 1932, at the request of counsel for the International Heater Company and First National Bank of Cincinnati an exception is noted to the foregoing order and decree, and bill sealed.

R. M. Gibson, District Judge. (Seal.)

Schedule A to Final Decree of Sale

Property Owned by National Radiator and/or The Receivers Which is to be Sold under the Foregoing Decree.

Clause I.

The Western Pennsylvania Plants and Fixed Properties, All Current Assets, and Miscellaneous Properties, comprising: * * *

(Abbreviated description appears as Parcel A in Schedule B, infra.)

[fol. 471] Clause II

The Trenton, New Jersey, Plant and Fixed Properties, comprising: * * *

(Abbreviated description appears as Parcel B in Schedule B, infra.)

Clause III

The Framingham, Massachusetts, Plant and Fixed Properties, comprising: * * *

(Abbreviated description appears as Parcel C in Schedule B, infra.)

Clause IV

The Western New York Plants and Fixed Properties, comprising: * * *

(Abbreviated description appears as Parcel D in Schedule B, infra.)

Clause V

The Chicago, Illinois, Plant and Fixed Properties, comprising: * * *

(Abbreviated description appears as Parcel E in Schedule B, infra.)

Clause VI

The Baltimore, Maryland, Warehouse Properties, comprising: * * *

(Abbreviated description appears as Parcel F in Schedule B, infra.)

Clause VII

The Cincinnati, Ohio, Warehouse Properties, comprising: * * *

(Abbreviated description appears as Parcel G in Schedule B, infra.)

[fol. 472] Clause VIII

The Richmond, Virginia, Warehouse Properties, comprising: * * *

(Abbreviated description appears as Parcel H in Schedule B, infra.)

Clause IX

The Garden City, N. Y., Warehouse Properties, comprising: • • •

(Abbreviated description appears as Parcel I in Schedule B, infra.)

Clause X

The Washington, D. C., Warehouse Properties, comprising: • • •

(Abbreviated description appears as Parcel J in Schedule B, infra.)

Schedule B to Final Decree of Sale

National Radiator Corporation

Notice of Sale

Notice is hereby given that, pursuant to a Final Decree of Sale (hereinafter called the "Decree") entered May 31, 1932, in the District Court of the United States for the Western District of Pennsylvania (hereinafter called the "Court"), in a certain cause therein entitled "Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants, against National Radiator Corporation, De- [fol. 473] fendant, in Equity No. 2558" (hereinafter called the "Primary Cause"), the undersigned Receivers will sell at public auction to the highest bidder or bidders, at the County Court House, in the City of New Castle, in the County of Lawrence, in the Commonwealth of Pennsylvania, on —— —, 1932, at — o'clock — M., all of the property of National Radiator Corporation and/or the Receivers described in the Decree and hereby directed to be sold.

The Decree is on file in the office of the Clerk of the Court and may be inspected at said office and copies thereof may also be inspected, on request, at the office of Messrs. Reed, Smith, Shaw & McClay, Solicitors for the Receivers, Union Trust Building, Pittsburgh, Pennsylvania. Ref-

erence is hereby made to the Decree and the records in the Primary Cause for the terms and conditions of the sale and for a more particular description of the properties and assets to be sold.

The following is a brief general description of the property to be sold, which, for the purposes of such sale, is divided into Parcels as indicated below, viz., all right, title and interest of National Radiator Corporation and/or the Receivers in and to the following:

Parcel A

(I) The plants, foundries, shops, general offices and dwelling house properties of National Radiator Corporation in the City of Johnstown, County of Cambria, Commonwealth of Pennsylvania.

[fol. 474] (II) The plants, foundries, shops and dwelling house properties of National Radiator Corporation adjoining the City of New Castle, in the Township of Shenango, County of Lawrence, Commonwealth of Pennsylvania.

(III) All inventories and stocks of merchandise manufactured, produced or in process of manufacture, raw materials, stores and supplies; all sales office furniture and fixtures, all notes, bills, acceptances and accounts receivable, debts, interest, rents and royalties receivable, demands, claims and choses in action; all cash on hand and in bank; all stocks, bonds and other securities and investments; all patents, patent rights, patent licenses, processes and secrets, trade marks, trade names, franchises (except the franchise to be a corporation), good-will and business, including the right to use National Radiator Corporation's corporate name; all pending contracts, leases and leasehold interests (other than such as are particularly appurtenant to the plants, warehouses or other fixed properties described in any of the other Parcels described below); and all other property of every name and nature whatsoever and whereosever situate belonging to or in the possession of or acquired by National Radiator Corporation and/or the Receivers and not included in any of the other Parcels described below.

Parcel B

The plants, foundries, shops, and dwelling house properties of National Radiator Corporation adjoining the City of Trenton, in the Township of Hamilton, County of Mercer, State of New Jersey.

[fol. 475] Parcel C

The plants, foundries and shops of National Radiator Corporation in the Town of Framingham, County of Middlesex, Commonwealth of Massachusetts.

Parcel D

(I) The plants, foundries and shops of National Radiator Corporation in the City of North Tonawanda, County of Niagara, State of New York.

(II) The plants, foundries and shops of National Radiator Corporation of the Town of Dunkirk, County of Chautauqua, State of New York.

Parcel E

(I) The plants, foundries, shops and warehouses of National Radiator Corporation in the City of Chicago, County of Cook, State of Illinois.

(II) A certain lot or parcel of land in the City of Chicago, County of Cook, State of Illinois, on which is situated the building known as the "Edgewood Apartment Hotel".

Parcel F

The warehouse of National Radiator Corporation in the City of Baltimore, State of Maryland.

Parcel G

The warehouse of National Radiator Corporation in the City of Cincinnati, County of Hamilton, State of Ohio.

[fol. 476] Parcel H

The warehouse of National Radiator Corporation in the City of Richmond, County of Henrico, State of Virginia.

Parcel I

The warehouse of National Radiator Corporation in the Town of Hemstead, County of Nassau, State of New York.

Parcel J

The warehouse of National Radiator Corporation in the City of Washington, District of Columbia.

In each case there shall be included in and sold with and as a part of the respective fixed properties comprised in the above described Parcels, the land and/or interests in land on which said properties are situated and all buildings, structures and other works, easements, rights of way, permits, privileges, licenses, machinery, equipment, patterns, flasks and appurtenances, and all other property, rights and franchises forming a part of or used in connection with the same, and all contracts particularly appertaining to said respective properties.

The property to be sold, both real and personal, may be inspected by intending bidders, subject to such reasonable regulations as the Receivers may prescribe.

As more fully provided by the Decree, to which reference is hereby made:

[fol. 477] 1. Such sale will be made without valuation, appraisement, exemption or extensions, and free from any right of redemption.

2. The property will be sold subject to the lien of taxes and assessments lawfully levied or assessed against the same and unpaid, and subject to the lien or charge of any lawful mortgage, pledge or other encumbrance thereon.

3. The Receivers may adjourn the sale from time to time as provided in the Decree, and they may, without further notice, advertisement or publication, proceed with the sale at the time to which the same may have been adjourned.

4. The sale will be made in the manner provided in Article VII of the Decree and subject to the terms and provisions thereof. The Receivers will first offer each of the above described Parcels for sale separately and note the highest bid for each such Parcel, and the Receivers will then offer for sale Parcels A, B, C, D, E, F, G, H, I and J

together as an entirety, as Parcel K, and note the highest bid therefor. If the highest bid noted for Parcel K equals or exceeds the aggregate of the highest bids for Parcels A to J, inclusive, when offered separately, the bids noted for Parcels A to J, inclusive, will be cancelled and said bid noted for Parcel K will be accepted. Otherwise the bid noted for Parcel K shall be cancelled and the highest bids noted for Parcels A to J, inclusive, will stand and be accepted by the Receivers and the several Parcels will be struck off and sold to the highest bidders for said respective Parcels.

[fol. 478] 5. The Receivers will refuse to receive any bid from anyone who shall not, at least 24 hours before the offer for sale by the Receivers of the property to be sold, file with the Receivers a statement as to whether or not he proposes to bid for the purposes of any plan or agreement of reorganization, and if so, the further statement that there has been filed with the Clerk of the Court a petition duly verified for the approval by the Court of said plan or agreement of reorganization in the event that the bidder becomes the successful bidder at the sale, together with a complete copy of such plan or agreement and a complete statement of the notice theretofore given of such plan or agreement, by publication or otherwise, to persons and corporations interested in National Radiator Corporation and its property; provided, however, that if any bid is made pursuant to the Plan and Agreement of Reorganization dated February 11, 1931, a copy whereof is annexed to the Bill of Complaint in the Primary Cause, such statement need not include a copy of said Plan and Agreement.

A hearing will be held on the Receivers' report to the Court of the result of the sale, at which the Court will hear complaints as to the equity of the provisions of any such plan or agreement of reorganization, affecting the respective priorities of all persons and corporations interested in National Radiator Corporation and its property, from all holders of the 6½% Sinking Fund Gold Debentures of National Radiator Corporation (hereinafter called the "Debentures") or other creditors, secured or unsecured, of National Radiator Corporation who before the date of [fol. 479] such hearing shall shall file with leave of Court their petitions in the Primary Cause for such purposes,

specifying in reasonable detail the particulars in which such plan or agreement is alleged by them to be inequitable. No sale of any property under the Decree to any purchaser who is to purchase said property for the purposes of any such plan or agreement of reorganization will be confirmed, if the Court shall, after such hearing, determine that the provisions of any such plan or agreement of reorganization are inequitable or that said plan or agreement of reorganization does not provide an equitable and timely offer of participation in such reorganization to all persons entitled thereto. The Receivers will publish a notice of the filing by any successful bidder or bidders of such statement with a copy of any such plan or agreement and that such copy may be examined by anyone wishing to do so at the office of the Clerk of the Court and of the time and place where said hearing upon the equity of the provisions of such plan or agreement will be held. All persons who shall fail to make any complaint at said hearing, as in the Decree provided, shall be barred from doing so thereafter.

6. The Receivers will refuse to receive a bid from any person offering to bid who shall not, at least 24 hours prior to any such offering by the Receivers for sale under the Decree, deposit with the Receivers and deliver to them as a pledge that he will make good his bid and as part payment of the purchase price in case of the acceptance of his bid (a) a sum in cash or check or checks of or certified [fol. 480] by some bank or trust company in New York, N. Y., Pittsburgh, Pa., Chicago, Ill., or Boston, Mass., acceptable to the Receivers, and made or endorsed payable to their order, equal to at least 10% of the minimum amount specified in Paragraph 7 of this notice in respect of the Parcel for which such person is offering to bid, or (b) Debentures in bearer form and/or coupons thereon due February 1, 1931 and/or August 1, 1931 and/or assignments of claims against National Radiator Corporation then finally established and allowed, aggregating in amount at least 40% of such minimum amount specified in said Paragraph 7 of this notice, or (c) partly cash and/or certified check or checks and/or partly Debentures and/or coupons and/or assignments of claims, in the same relative proportions. Any person offering to bid for two or more Parcels shall make a separate deposit with respect

to each such Parcel for which he offers to bid, or make one or more deposits equal to the aggregate of such separate deposits. A deposit made to qualify any person to bid for Parcel K will also qualify such person to bid separately for one or more of Parcels A to J, inclusive, In lieu of such deposit, the Receivers may accept the certificate or certificates of any bank or trust company acceptable to them, that it holds, subject to their order, cash, checks, Debentures, coupons and/or assignments of claims, all of the character above specified. Any deposit received from an unsuecesful bidder will be returned to him at the conclusion of the bidding, but without interest thereon. The deposit received from a successful bidder will be applied on account of the purchase price of the property [fol. 481] purchased by such bidder in case the sale to him shall be confirmed, and in case the Court shall deny confirmation of the sale to a successful bidder, his deposit will be returned to him on his demand therefor, but without interest thereon.

For the terms and conditions upon which the deposit received from any successful bidder to whom a sale has been confirmed may be forfeited, reference is hereby made to Section 37 of the Decree.

7. The Receivers will not receive any bid for any Parcel of the property to be sold less than the respective minimum amounts hereinafter set forth:

Parcel A	$2,392,000
Parcel B	28,000
Parcel C	17,500
Parcel D	37,500
Parcel E	17,500
Parcel F	1,000
Parcel G	2,250
Parcel H	1,000
Parcel I	1,000
Parcel J	2,250
Parcel K	2,500,000

8. The purchaser of Parcel A of the property (whether sold separately or as a part of Parcel K), in addition to the amount of his accepted bid for said property and as part consideration for said property and as part of the

purchase price thereof, shall be required to assume the obligations of the Receivers under existing executory contracts, leases and agreements, entered into, assumed or adopted by the Receivers.

[fol. 482] 9. The purchase price of any property sold may be paid in cash, or the purchaser may satisfy any residue of his bid in whole or in part by turning over to the Receivers at their distributive value to be credited and returned as provided in Article X of the Decree, Debentures in bearer form and/or coupons thereon due February 1, 1931 and/or August 1, 1931 and/or assignments of claims against National Radiator Corporation then finally established and allowed. In lieu of Debentures and/or coupons and/or assigned claims, the Receivers may accept the certificate or certificates of any bank or trust company in New York, N. Y., Pittsburgh, Pa., Chicago, Ill., or Boston, Mass., acceptable to them, that it holds, subject to their order, such Debentures and/or coupons and/or assignments of claims against National Radiator Corporation finally established and allowed. In lieu of Debentures and/or coupons and/or assigned claims, the Receivers may accept the certificate or certificates of any bank or trust company in New York, N. Y., Pittsburgh, Pa., Chicago, Ill., or Boston, Mass., acceptable to them, that it holds, subject to their order, such Debentures and/or coupons and/or assignments of claims against National Radiator Corporation finally established and allowed.

By the Decree, the Court reserves the right to re-take and re-sell any Parcel of the property sold to enforce the payment of the purchase price and the performance of the obligations required by the Decree to be assumed by the purchaser of Parcel A.

10. The purchaser of any property sold shall have the right to appear in the Primary Cause and he or any of the parties to the Primary Cause shall have the right to contest any claim, demand or allowance pending at the time of the sale and then undetermined and any claim, demand or allowance which would be payable by such purchaser, and he or any such party may appeal from any decision relating to any such claim, demand or allowance.

[fol. 483] 11. Upon confirmation of the sale and upon payment of the purchase price or such portion thereof as

the Court shall direct, the purchaser shall be entitled to receive delivery of a deed or deeds or other proper instrument or instruments of conveyance, assignment and transfer of the property sold; and the Receivers will assign, transfer and deliver to the purchaser of Parcel A all cash (less the sum of $300,000, which shall be retained by the Receivers and treated as part payment of the purchase price of said Parcel A), and all current assets, materials and supplies then in the possession of the Receivers.

Prior to the delivery of possession as provided in Article XIV of the Decree, the Receivers may continue to operate the properties in receivership and to carry on the business of National Radiator Corporation and to use for such purpose the cash, current assets, materials or supplies now or hereinafter in the possession of the Receivers.

12. The Receivers will, not more than 20 nor less than 10 days prior to the date fixed for the sale, file in the Primary Cause an approximate and advisory statement or statements with reference to the matters specified in Article XV of the Decree. Reference is hereby made to said Article XV of the Decree and to the statement or statements to be filed as thereby provided.

13. As provided in Article XVI of the Decree, (a) any purchaser may, within the time thereby limited, elect not to assume or adopt any contract, lease or agreement not fully performed, heretofore made or assumed by National [fol. 484] Radiator Corporation (but not any contract, lease or agreement entered into, made, assumed or adopted by the Receivers which does not expressly reserve to the purchaser the right to elect not to assume or adopt such contract, lease or agreement); and (b) any purchaser may also elect not to accept any part of the property sold to him, but such election shall not entitle such purchaser to any reduction in the amount of the bid made at the sale or in the amounts to be paid as provided in the Decree.

14. The Receivers will report the result of the sale to the Court at Room 301, in the Post Office Building in Pittsburgh, Pa., at 10:30 o'clock in the forenoon on —— —, 1932, or, in the event that the sale shall be adjourned, then on the tenth day following such adjourned sale, for such further orders, judgments or decrees as the Court may deem proper and advisable, and the Court has reserved

the right at said time either to adjourn the hearing upon such report of the Receivers or at said time or any other time to which said hearing may be adjourned to order the confirmation or disapproval of the sale, to order such further or other sale, if any, as may be deemed advisable, to hear complaints upon the matters referred to in Paragraph 5 of this notice, and to make such orders in the premises as it may deem proper. As provided by the decree, notice is hereby given that this cause is set for further hearing before the Court at the time and place of the making of the above directed report to the Court, and such hearing may be had without any further notice to any party.

[fol. 485] 15. All matters not determined by the Decree are reserved by the Court for future determination.

Dated —— —, 1932.

Robert S. Waters, William G. Heiner, Receivers and Ancillary Receivers. Reed, Smith, Shaw & McClay, Union Trust Building, Pittsburgh, Pennsylvania, Solicitors for the Receivers.

Cpy. 7843.

IN UNITED STATES DISTRICT COURT

RECEIVERS' SUPPLEMENTAL SCHEDULE PREPARED PURSUANT TO SECTION 53 OF THE FINAL DECREE OF SALE—Filed June 11, 1932

On January 2, 1932, Robert S. Waters and William G. Heiner, Receivers of National Radiator Corporation, filed their first report and inventory of assets and property of National Radiator Corporation. The inventory was taken at book value and contained in detail the assets and property of National Radiator Corporation, as of October 9, 1931.

Subsequent to October 9, 1931, there have been acquired or disposed of by National Radiator Corporation and/or its Receivers, and only (except as hereinafter stated under Item #2) in the ordinary course of business, only inventory, supplies, cash (including cash invested in United [fol. 486] States securities under authority of court order), and accounts and notes receivable created by sales or

realized by collection, and there have been no changes in the other assets and property as shown by said inventory except as follows:

Item #1. Edgewood Apartment Hotel

On Sheet 189 of the Receivers' Inventory, filed January 2, 1932, under the heading of Real Estate Investments, appeared the following:

"Edgewater Apartment Hotel, Chicago, Illinois $51,172.31"

(Property taken over to offset account of Schampel & Dougherty, Inc., Chicago, Illinois.)

This should have been called Edgewood Apartment Hotel. The acquisition of this property by National Radiator Corporation was in payment of an unsecured debt of Schampel & Dougherty, Inc., Chicago, Illinois, amounting to $51,172.31, the debtor having no other means of payment and subsequently becoming bankrupt. The deed to National Radiator Corporation was dated September 16, 1930. The property is located in Cochran's Addition to Edgewater, Chicago, Illinois. At the time of acquiring title, there was an unpaid bond issue of $170,000.00, secured by mortgage, and other liens against this property. In April, 1931, the trustee of this mortgage instituted foreclosure proceedings. National Radiator Corporation has only an equity of redemption in this property for a period of one year from the date of foreclosure sale. Approximately $208,000.00 of mortgage debt, interest, taxes and other liens come ahead of National Radiator Corporation's equity of redemption. [fol. 487] The land, building, furniture and furnishings was appraised in May, 1932, by J. L. Cochran and L. T. Kelly, Chicago, Illinois, real estate experts at depreciated replacement values of $135,893.07 and $133,000.00, respectively.

Item #2. National Steel Boiler Company

On sheet 156 of the Receivers' Inventory, filed January 2, 1932, under the heading of Regular Accounts Receivable, appeared the following:

"National Steel Boiler Works, 14th & Buttonwood Street, Lebanon, Pennsylvania ..... $83,251.15"

On October 9, 1931, National Radiator Corporation was the owner of the majority of the outstanding capital stock of

National Steel Boiler Company. The plant of this Company was located at Lebanon, Pennsylvania. Prior to October 9, 1931, National Radiator Corporation had been financing the operations of said National Steel Boiler Company. As of October 9, 1931, the indebtedness of National Steel Boiler Company to National Radiator Corporation was $83,251.15. In collecting this indebtedness, the Receivers of National Radiator Corporation purchased from National Steel Boiler Company, raw materials, goods in process of manufacture and finished products at $44,751.34 and credited the indebtedness of National Steel Boiler Company in the same amount. The Receivers also took from National Steel Boiler Company a mortgage on the real estate, buildings, machinery and equipment of National Steel Boiler Company in the amount of $38,499.81 [fol. 488] and a lease of the buildings, machinery and equipment for a period of two years, at a monthly rental of $1,000.00, to be paid in the event, and only in the event, that the amount of the rental would be earned by the Receivers in their operations of such property. A payment of $2,144.71 has been paid to the Receivers by National Steel Boiler Company on account of and in reduction of said mortgage.

Item #3. Minneapolis, Minnesota, Residential Property

On April 12, 1928, Agnes T. Welter and Michael A. Welter conveyed to National Radiator Corporation all that certain tract or parcel of land situate in the County of Hennepin, State of Minnesota, described as follows, to wit:

Lot Three (3), Block Four (4), Marsh & Bartlett's First Addition to Minneapolis, according to the map and plat thereof on file and of record in the office of the Register of Deeds in and for Hennepin County, Minnesota.

The deed for this property was recorded in the office of the Register of Deeds of Hennepin County, Minnesota, in Book 1092 of Deeds at page 566. This same property is referred to on page 57 of the Final Decree of Sale, of the above court, dated May 31, 1932. This property was deeded to National Radiator Corporation to apply against an indebtedness of Michael A. Welter. The amount of this indebtedness had been charged off on the books of National Radi-

ator Corporation prior to taking title to this property and [fol. 489] no record appeared on National Radiator Corporation's books covering this property at the time of the appointment of the Receivers. Consequently, the ownership of this property by National Radiator Corporation did not appear upon the books of said Corporation and was unknown to your Receivers at the time of filing their inventory on January 2, 1932. Against this property there are unpaid taxes, not including penalties and/or interest, as follows: Year 1928, $185.26; Year 1929, $176.26; Year 1930, $149.58; and Year 1931, $132.38, or a total of $643.48. There is erected on this lot a two-story frame house and garage. In 1928, National Radiator Corporation offered the property for sale for $4,000.00, but was never able to dispose of the property.

Robert S. Waters and William G. Heiner, as Receivers of National Radiator Corporation.

Duly sworn to by Robert S. Waters and William G. Heiner. Jurat omitted in printing.

[fol. 490] Sworn to and subscribed before me this 9th day of June, 1932. My commission expires March 7, 1933. H. A. Hershey, Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 23, 1932

First National Bank of Cincinnati and International Heater Company, intervening defendants in the above-entitled action, believing themselves to be aggrieved by the order and decree made and entered on the 31st day of May, 1932, in the above-entitled cause, do hereby jointly and severally appeal therefrom to the Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignments of error which are filed herein, and pray that this appeal may be allowed, that a citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order and decree were made, be duly authenticated and sent to the Circuit Court of Appeals for the Third Circuit, and the aforesaid peti-

tioners and each of them pray that a proper order as to the security to be required to perfect this appeal be made, and for all general and equitable relief.

Dated Pittsburgh, Pennsylvania, July —, 1932.

First National Bank of Cincinnati, International Heater Company, Petitioners, by Baker & Watts, Alter, Wright & Barron, Their Counsel.

[fol. 491] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed July 23, 1932

Now, come First National Bank of Cincinnati, by Baker & Watts, its counsel, and International Heater Company, by Alter, Wright & Barron, its counsel, and jointly and severally respectfully represent unto this Court that in the records and proceedings had in the above entitled cause and in the rendition of the decree made on May 31, 1932, ordering the sale of the assets and properties of defendant National Radiator Corporation, there is manifest error for which the decree of the District Court of the United States for The Western District of Pennsylvania should be reversed, and as cause for said error, show:

I

The District Court erred in making and entering the order and final decree dated May 31, 1932, to which exceptions have been duly noted in behalf of the appellants herein, said decree and the said exceptions being made part hereof by reference thereto as the same appear in the record of this case.

II

The District Court erred in holding that at the time of the filing of the bill National Radiator Corporation had no means at hand with which to meet, pay or satisfy the interest charges on the debentures. (Decree, Article IV, paragraph 26.)

[fol. 492]

III

The District Court erred in failing to hold that the insufficiency of the cash and other readily realizable assets of

National Radiator to pay the indebtedness of National Radiator Corporation now payable is due to the voluntary default of National Radiator Corporation in the payment of the interest charges on the debentures.

IV

The District Court erred in holding that the unity of the property of National Radiator Corporation and its integrity as a whole as now held and operated constitute an important element of value. (Decree, Article IV, paragraph 26.)

V

The District Court erred in holding that the properties and assets of National Radiator Corporation if sold under separate levies, would in all probability net an amount wholly inadequate to pay and satisfy its obligations. (Decree, Article IV, paragraph 26.)

VI

The District Court erred in holding that continuation of the receivership cannot produce results sufficiently favorable to justify its continuance, and in failing to hold that the operation of the active plants of the Corporation as conducted by the receivers resulted in an operating profit before cost of maintaining idle plants. (Decree, Article IV, paragraph 26.)

[fol. 493]

VII

The District Court erred in holding that the interests of the creditors of National Radiator Corporation would best be served by the speedy sale of all its properties, assets and business as an entirety. (Decree, Article IV, paragraph 26.)

VIII

The District Court erred in holding that this cause was instituted or prosecuted by the Bankers Trust Company as trustee. (Decree, Article IV, paragraph 27.)

IX

The District Court erred in holding that this cause was instituted, and that the answer of National Radiator Cor-

poration admitting the truth of the allegations of the bill was submitted, for the purpose of conserving the property of National Radiator Corporation. (Decree, Article IV, paragraph 27.)

X

The District Court erred in failing to hold that the complainants filed the bill of complaint herein for the purpose of bringing about the receivership as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931.

XI

The District Court erred in holding that there was no evidence of collusion on the part of the complainants, of the Bankers Trust Company and of National Radiator Corporation in connection with any of the proceedings herein. [fol. 494] (Decree, Article IV, paragraph 27.)

XII

The District Court erred in holding that the complainants and the Bankers Trust Company are legally entitled to a sale pursuant to this decree of all of the property, assets and business of National Radiator Corporation as prayed for in the bill and in the intervening petition of the Bankers Trust Company. (Decree, Article IV, paragraph 28.)

XIII

The District Court erred in holding that all property and interest in property of every kind, character and description of the National Radiator Corporation and/or the receivers, including cash on hand or in bank, securities, bills and accounts receivable, and choses in action shall be sold in the manner prescribed in said decree. (Decree, Article VI, paragraph 30.)

XIV

The District Court erred in providing for the sale in the manner provided in the decree, in that the sale was prescribed in such a manner as to effectuate only the design of the complainants to obtain the property of the corporation at their own terms, and in clear violation of the rights of the creditors including these appellants.

XV

The District Court erred in holding that cash on hand or in bank, securities, bills or accounts receivable and choses in action shall be sold in the manner prescribed in said decree, [fol. 495] and in failing to hold that such assets should be retained and collected and turned into cash by the Receivers in ordinary routine. (Decree, Schedule A, Clause I.)

XVI

The District Court erred in holding that the inventory shall be sold in the manner prescribed in said decree, and in failing to hold that such inventory should be turned into cash by the Receivers in ordinary routine. (Decree, Schedule A, Clause I.)

XVII

The District Court erred in holding that the majority stock of the National Steel Boiler Company, the $86,000 claim of this corporation against said company and the mortgage securing said claim, together with the equitable rights of this corporation in respect to the Steel Boiler Company, should be sold in the manner prescribed in the decree, and in failing to make suitable provision directing a thorough investigation, under the supervision of counsel independent of the influence of the complainants and defendant, of the rights of the corporation in respect to these assets and the taking of proper proceedings for the protection of the rights of the corporation and of its creditors in respect thereof, and in failing to make provision for the separate sale in a proper manner of the interests of the corporation in such Steel Boiler Company.

XVIII

The District Court erred in decreeing that all of the assets of every description including cash on hand and in [fol. 496] bank, securities, bills and accounts receivable, choses in action, inventory, the interest of the corporation in the National Steel Boiler Company consisting of shares of stock, the $86,000 claim and the equitable rights which entitle the corporation to the complete ownership of said Steel Boiler Company, should be sold as one lot (excepting only certain real estate referred to in assignments of er-

ror Nos. XIX-XXVII) and at a sale to be conducted at New Castle, Pennsylvania, and at an upset price of $2,392,000. (Decree, Schedule A, Clause I and Article VIII, paragraph 38.)

XIX

The District Court erred in decreeing that the real estate, plant, foundries, shops and dwelling house properties with the machinery, equipment, patterns, flasks and appurtenances located at Trenton, New Jersey, should be sold as one lot and at a sale to be conducted at New Castle, Pennsylvania, at an upset price of $28,000. (Decree, Schedule A, Clause II and Article VIII, paragraph 38.)

XX

The District Court erred in decreeing that the real estate, plant, foundries and shops with the machinery, equipment, patterns, flasks and appurtenances located at Framingham, Massachusetts, should be sold as one lot and at a sale to be conducted at New Castle, Pennsylvania, at an upset price of $17,500. (Decree, Schedule A, Clause III and Article VIII, paragraph 38.)

[fol. 497]

XXI

The District Court erred in decreeing that (a) the real estate, plants, foundries and shops located at North Tonawanda, New York, with the machinery, equipment, patterns, flasks and appurtenances; and (b) the real estate, plants, foundries and shops located at Dunkirk, New York, with the machinery, equipment, patterns, flasks and appurtenances, should all be sold as one lot and at a sale to be conducted at New Castle, Pennsylvania, at an upset price of $37,500. (Decree, Schedule A, Clause IX, and Article VIII, paragraph 38.)

XXII

The District Court erred in decreeing that (a) the real estate, plants, foundries and shops with the machinery, equipment, patterns, flasks and appurtenances located at Chicago, Illinois; and (b) the real estate known as "Edgewater Apartment Hotel" located at Chicago, Illinois; and (c) the warehouse located at Chicago, Illinois, should be sold as one lot and at a sale to be conducted at New Castle,

Pennsylvania, at an upset price of $17,500. (Decree, Schedule A, Clause V, and Article VIII, paragraph 38.)

XXIII

The District Court erred in decreeing that the real estate and warehouse located at Baltimore, Maryland, together with the machinery, equipment and appurtenances, should be sold at a sale to be conducted at New Castle, Pennsylvania, at an upset price of $1,000. (Decree, Schedule A, Clause VI, and Article VIII, paragraph 38.)

[fol. 498]

XXIV

The District Court erred in decreeing that the real estate and warehouse located at Cincinnati, Ohio, together with the machinery, equipment and appurtenances should be sold at a sale to be conducted at New Castle, Pennsylvania, at an upset price of $2,150. (Decree, Schedule A, Clause VII, and Article VIII, paragraph 38.)

XXV

The District Court erred in decreeing that the real estate and warehouse located at Richmond, Virginia, together with the machinery, equipment and appurtenances, should be sold at a sale to be conducted at New Castle, Pennsylvania, at an upset price of $1,000. (Decree, Schedule A, Clause VIII, and Article VIII, paragraph 38.)

XXVI

The District Court erred in decreeing that the real estate and warehouses located at Garden City, New York, together with the machinery, equipment and appurtenances, should be sold at a sale to be conducted at New Castle, Pennsylvania, at an upset price of $1,000. (Decree, Schedule A, Clause IX, and Article VIII, paragraph 38.)

XXVII

The District Court erred in decreeing that the real estate and warehouse located at Washington, D. C., together with the machinery, equipment and appurtenances, should be sold at a sale to be conducted at New Castle, Pennsylvania, [fol. 499] at an upset price of $1,250. (Decree, Schedule A, Clause X, and Article VIII, paragraph 38.)

XXVIII

The District Court erred in holding that all of the properties of the corporation of every description, that is to say, the properties mentioned in Assignments of Error Nos. XVIII-XXVII should be sold as one lot at New Castle, Pennsylvania, at an upset price of $2,500,000. (Decree, Article VIII, paragraph 38.)

XXIX

The District Court erred in failing to provide that every separate piece of real estate, that is every separate plant, dwelling house, warehouse, apartment house and office building, should be sold separately at the several places where such separate properties are situated, and in failing to make provision instructing the Receivers to advertise the sale of said properties adequately in newspapers and by other suitable means and to list the property with real estate brokers and to take all suitable and requisite steps to give reasonable assurance of competitive bidding, and in failing to decree postponement of such sales to a suitable time rather than to put it in the hands of the Reorganization Committee to bring about the sale to themselves upon mere perfunctory legal notice and at an unsuitable place and in the midst of the summer months and during a period of great depression.

XXX

The District Court erred in decreeing that the real estate situated at Trenton, New Jersey; Framingham, Massa-
[fol. 500] chusetts; North Tonawanda, New York; Dunkirk, New York; Chicago, Illinois; Baltimore, Maryland; Cincinnati, Ohio; Richmond, Virginia; Garden City, New York; Washington, D. C., and Johnstown, Pennsylvania, should all be sold at New Castle, Pennsylvana, in violation of the provisions of Section 847, Title 28, of the Judicial Code. (Decree, Article VI, paragraph 33.)

XXXI

The District Court erred in failing to make a suitable provision for appraisement of the properties provided to be sold under the decree or in taking other suitable means

for arriving at a just and fair conclusion as to the amount which the assets of the corporation might be fairly expected to realize if the cash, securities, accounts and notes receivable were realized upon by the Receivers in ordinary course without public sale thereof, and the separate parcels of real estate were separately offered for public sale in a proper manner at a proper place with proper and suitable safeguards and provisions for advertising, etc., and at a proper time, and if the rights of the corporation and of its creditors had been suitably protected in respect of the Steel Boiler Company and that asset recovered and property realized upon, and in failing to fix an upset price which would surely equal the amount which could fairly be realized by a careful liquidation of the assets in normal and proper course.

[fol. 501]

XXXII

The District Court erred in so shaping the decree as to effectuate the purpose of the complainants in obtaining a mere perfunctory judicial sale for the benefit of the complainants and in fixing the upset price at which the Reorganization Committee should obtain the property at a grossly inadequate figure and at much less than could fairly be obtained for such property by the realization in regular course without judicial sale of the assets other than real estate and the conduct of separate judicial sales of the real estate in proper manner.

XXXIII

The District Court erred in so shaping the decree as to put the Reorganization Committee in a position to grant immunity to the officers of the corporation for their fraudulent acts in respect to the Steel Boiler Company and without providing any protection for the rights of the creditors, including these appellants, in respect thereto.

XXXIV

The District Court erred in so shaping the decree as to effectuate the design of the Reorganization Committee to acquire the assets of the corporation for the purposes of the Reorganization Plan, in that—notwithstanding that the decree is so designed as to effectuate the passing of the

property to the Reorganization Committee at a price very much less than could fairly be realized upon the assets if liquidated in normal course—the Plan provides for the sharing by the stockholders of the corporation in fraud and [fol. 502] in violation of the rights of the creditors, including these appellants, viz., the preferred stockholders to share freely and without any additional contribution whatsoever and the common stockholders to share upon a contribution nominal in amount.

XXXV

The District Court erred in permitting the witness Robert S. Waters to answer upon direct examination, over the objection of appellant First National Bank of Cincinnati, the following questions, which with the objections, rulings of the court and exception thereto are as follows:

"Q. Mr. Waters, I am going to put a question to you presently on upset price, and so that you will have in mind what I mean by 'upset price' when I put that question to you, I am reading from the opinion of the Court in Guaranty Trust Company against Chicago, Milwaukee & St. Paul Railway Company, 15 Fed. (2d) 434, at page 442. Here is what the Court says on upset price: 'What the Court is doing in naming an upest price is merely to draw a line below which it will refuse to consider bids. It is discretionary with the Court, but quite common, to fix an upset price.' Taking the phrase 'upset price' in that sense, it fixes a line below which the Court will refuse to consider bids. Do you have in mind a figure that you would consider proper for the upset price of the property of this corporation? Just state whether or not you have the figure in mind?

A. Yes, I have.

Q. What is it?

[fol. 503] Mr. Royall: Object. Now, Your Honor, this is objectionable for so many reasons that I want to put them on record. In the first place, what Judge Wilkerson said in the Chicago, Milwaukee & St. Paul receivership has no relationship, no possible relationship to the situation we have here.

* * * * * * *

Mr. Teall: It is my purpose to follow this with the further question, asking the witness to explain how he arrives at the figure he is expressing, what is the basis of his opinion * * * it is simply to give the Court such light as we can, that is all.

Mr. Royall: I press my objection, Your Honor.

The Court: Go ahead for what it is worth.

Mr. Royall: My objection is noted, Your Honor, and I press it very seriously.

The Court: I note you an exception.

Mr. Royall: I think this is very highly objectionable, Your Honor.

The Court: I do not see any other way of getting at it.

A. I arrive at the total of $2,195,695, arrived at in this manner: * * *"

[fol. 504] XXXVI

The Court also erred in admitting, over the objection of the appellant First National Bank of Cincinnati further testimony by the witness, Robert S. Waters, elaborating the details and explanations of the witness in answer to the main question set forth in Assignment XXXV, and in admitting similar testimony from the witnesses R. B. Flershem, John H. Waters and William G. Heiner.

Wherefore, and in order that the foregoing Assignments of Error may be and appear of record in this cause, said intervening defendants jointly and severally present the same to this Court and jointly and severally pray that disposition may be made thereof in accordance with law and the statutes of the United States in such case made and provided; and said intervening defendants jointly and severally further pray that the decree for the sale of the properties and assets of the defendant corporation, entered May 31, 1932, be reversed and that a decree be entered in accordance with and for the protection of the rights of these said intervening defendants and as may be for the best interest and protection of all creditors of said defendant corporation.

Dated July 23, 1932.

Baker & Watts, Alter, Wright & Barron, Solicitors for said Intervening Defendants.

[fol. 505] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

And now, to-wit this 23rd day of July, 1932, appeal allowed, citation awarded and appellants directed to file bond in the sum of $1,000.00 conditioned upon payment of costs of appeal.

R. M. Gibson, District Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO FILING STATEMENT

"On July 28, 1932, the Receivers filed Statement pursuant to Section 54, Article XV, of the Final Decree of Sale. Sidney J. Watts, of Counsel for Appellant. Maynard Teall, of Counsel for Appellee."

IN UNITED STATES DISTRICT COURT

PETITION FOR APPROVAL OF PLAN AND AGREEMENT, DATED FEBRUARY 11, 1931, FOR THE REORGANIZATION OF NATIONAL RADIATOR CORPORATION—Filed July 29, 1932

To the Honorable the Judges of said Court:

Your petitioners, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization [fol. 506] of National Radiator Corporation (hereinafter called the "Plan and Agreement"), respectfully allege and show to this Court as follows:

1. Your petitioners are constituted a Reorganization Committee by the Plan and Agreement and as such represent holders of all classes of securities issued by the defendant National Radiator Corporation (hereinafter called "National Radiator") and are the complainants in this cause.

2. Your petitioners, as the Reorganization Committee under the Plan and Agreement, in furtherance and for the purposes of the Plan and Agreement propose to bid or to cause designated purchasers to bid on their behalf at the sale of the property of National Radiator and/or its Receivers, directed to be sold by the Final Decree of Sale made and entered in this cause May 31, 1932 (hereinafter called the "Final Decree") and to that end desire to obtain the approval of this Court of the Plan and Agreement as fair and equitable to the creditors and stockholders of National Radiator and an adjudication that said Plan and Agreement provides an equitable and timely offer of participation in the Reorganization of National Radiator thereby proposed to all persons and corporations interested in National Radiator and its property.

3. A copy of the Plan and Agreement, marked Schedule B, is annexed to and made a part of the Bill of Complaint in this cause and your petitioners pray leave to refer to the same with the same force and effect as if herein set forth at length.

[fol. 507] 4. The Plan and Agreement has been declared operative and no substitute plan has been adopted in its stead and it has not been modified or amended, except that by letter dated September 16, 1931, directed to the security holders of National Radiator, the Reorganization Committee acting under the Plan and Agreement has augmented said Plan by the supplementary provisions to Article III thereof set forth in said letter. A copy of said letter is annexed hereto and made a part hereof as Exhibit 1.

5. There have been deposited under the Plan and Agreement approximately 96% in principal amount of the outstanding 6½% Sinking Fund Gold Debentures of National Radiator and more than 78% of the $7 Cumulative Convertible Preferred Stock without par value and more than 38% of the Common Stock without par value of National Radiator. These constitute all classes of the outstanding securities of National Radiator, and the amounts thereof on deposit under the Plan and Agreement, to the percentage aforesaid, are shown by the affidavit of E. E. Beach, Assistant Secretary of Bankers Trust Company, the Depositary appointed by said Plan and Agreement, which

affidavit is annexed hereto and made a part hereof as Exhibit 2. Said affidavit also states that, except as hereinbefore stated, there has not been deposited with said Depositary under the Plan and Agreement any assignments of claims of any general creditor of National Radiator, as is permitted by Article IX of said Plan.

[fol. 508] 6. Extensive, timely and ample notice of the promulgation of the Plan and Agreement by your petitioners as the Reorganization Committee and notice that said Plan and Agreement has been declared operative September 15, 1931, and notice thereafter that the same has been adopted and approved by the only other representatives of any substantial amount of securities of National Radiator was given at the times and in the manner shown in the affidavit of Harold F. Linder, acting Secretary of the Reorganization Committee constituted under the Plan and Agreement, which affidavit is annexed hereto and made a part hereof as Exhibit 3.

7. Deposits of securities under the Plan and Agreement are being received without the imposition of penalty and will continue to be received until instructions to the contrary are given to Bankers Trust Company, the Depositary under said Plan and Agreement.

8. So far as your petitioners are informed, whatever opposition there may be to the Plan and Agreement has been expressed to this Court by the First National Bank of Cincinnati, a party intervener in this cause, and by one Lily Clapier, the complainant in the cause pending in this Court and entitled "Lily Clapier, Complainant, against Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation and National Radiator Corporation, Defendants, in Equity No. 2597".

[fol. 509] 9. By Section 34 of Article VI of the Final Decree the tenth day following the date of the sale directed by said Final Decree, at 10:30 o'clock in the forenoon, or if said day be a Sunday or legal holiday, then the next day not a Sunday or legal holiday, is fixed as the time when, and Room 301 in the Post Office Building in the

City of Pittsburgh, Pennsylvania, is fixed as the place where, this Court will receive the report of the result of such sale and consider the entry of such further orders, judgments or decrees as may by this Court be deemed proper and advisable; and this Court by Section 36 of Article VIII of said Final Decree has also reserved the right at said hearing to hear complaints as to the equity of the provisions of the Plan and Agreement hereinabove referred to, affecting the respective priorities of all persons and corporations interested in National Radiator and its property, from all Debenture holders or other creditors, secured or unsecured, of National Radiator, who before the date of such hearing shall file, with leave of this Court, their petitions herein for such purpose, specifying in reasonable detail the particulars in which said Plan and Agreement is alleged by them to be inequitable.

Wherefore, your petitioners pray that at the hearing to be held upon the Receivers' Report of Sale referred to in Section 34 of Article VI of the above mentioned Final Decree this Court approve the Plan and Agreement as fair and equitable and adjudicate that said Plan and Agreement provides an equitable and timely offer of participation in [fol. 510] the Reorganization thereby proposed to all persons and corporations interested in National Radiator and its property.

Dated July 26, 1932.

Rudolph B. Flershem, Charles O. Cornell, John H. Waters, Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, by Rolan J. Dodds, Their Solicitor. Reed, Smith, Shaw & McClay, Milbank, Tweed, Hope & Webb, of Counsel.

Duly sworn to by Charles O. Cornell. Jurat omitted in printing.

[fol. 511] EXHIBIT 1 TO PETITION

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Armand Erpf, Secretary, 50 Broad Street, New York. Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, Counsel.

New York, September 16, 1931.

To security holders of National Radiator Corporation:

The Reorganization Committee acting under the abovementioned Plan and Agreement has augmented said Plan [fol. 512] by the following supplementary provisions to Article III thereof.

In respect of the description of the 15-Year 5% Debentures to be authorized by the New Company provided for in said Plan:

(a) In the Indenture under which said Debentures will be issued the New Company will also covenant that so long as any of the New Debentures are outstanding it will not mortgage or pledge any of its property or assets to secure any funded debt as defined in the Indenture without simultaneously making provisions for securing such New Debentures by a prior lien upon such property or assets. The Indenture aforesaid shall contain clauses in this regard substantially similar to those contained in Paragraph B of Section 11 of Article IV of the Indenture dated August 1, 1927, under which are now outstanding National Radiator Corporation's 6½% Sinking Fund Gold Debentures.

(b) The Indenture under which the New Debentures are to be issued shall provide that for the purpose of defining net earnings of the New Company, out of which current and unpaid accumulated interest on said New Debentures will be payable, there shall not be deductible in excess of $300,000 for depreciation in the calendar year 1934 or in any calendar year thereafter.

(c) The Indenture aforesaid shall contain clauses substantially similar to those recited in Article V of the In-

denture dated August 1, 1927, under which are now out-
[fol. 513] standing National Radiator Corporation's 6½%
Sinking Fund Gold Debentures, to the effect that

(1) it shall constitute an event of default should the New Company fail in the observance of any of the covenants or agreements on its part to be performed and the same shall not be remedied within 60 days after written notice of such default shall have been served upon said New Company by the Trustee acting under said Indenture; and

(2) default having occurred as aforesaid, the Trustee acting under said Indenture may in its discretion, and, upon request in writing by the holders of at least 25% in principal amount of the New Debentures then outstanding, shall, upon indemnification satisfactory to it, declare the principal of and interest on all said New Debentures, if not already due, to be forthwith due and payable; and

(3) nothing in said Indenture or in the New Debentures or in the coupons attached thereto shall affect or impair the obligation of the New Company to pay the principal and interest of the New Debentures to the respective holders or registered owners thereof as in such Debentures and coupons stated nor affect or impair the right of action at law of such holders to enforce such payment by virtue of the contract contained in the New Debentures and not by virtue or availing of any provision of the Indenture.

[fol. 514] (d) The Indenture aforesaid shall also provide that it shall be an event of default should the net current assets of the New Company, computed according to standard accounting practice, be at the end of any calendar year commencing with the calendar year 1934, less than 55% of the principal amount of the New Debentures at the time outstanding. In the event of such default, the remedies of the Trustee acting under said Indenture shall be as set forth in subdivision (2) of paragraph (c) above.

In respect of the $7 Preferred Stock to be authorized by the New Company provided for in said Plan:

(e) Funds legally available for dividends shall be limited to surplus profits or net earnings arising after the organization of the New Company and in no event shall be comprised of paid-in surplus.

(f) In the calculation of surplus profits or net earnings, available for dividends in any calendar year, deduction shall first be made therefrom of the earnings during such year payable as debenture interest.

The Reorganization Plan and Agreement, as augmented by the foregoing supplementary provisions, has been approved and adopted by the Bondholders' Protective Committee constituted under the Deposit Agreement dated as of February 2, 1931. A member of said Protective Committee will become a member of the Reorganization Committee as well as of the Board of Directors of the New Company provided for in the Reorganization Plan. The Deben- [fol. 515] tures on deposit with said Protective Committee are of substantial amount and, together with the Debentures already on deposit under the Reorganization Plan, exceed 90% of the entire issue of National Radiator Corporation Debentures outstanding. Securityholders who have not as yet deposited under the Reorganization Plan should do so at once. No securityholder whose Debentures or stock certificates are not deposited under the Reorganization Plan will be entitled to participate in its benefits.

The deposit of all classes of securities should be made with Bankers Trust Company, Depositary, 16 Wall Street, New York. Transferable Certificates of Deposit will be issued by said Depositary in respect of all deposited securities. Debentures now on deposit with Empire Trust Company, in New York, or with the Chicago Trust Company, in Chicago, or with the Bank of America National Trust and Savings Association, in Los Angeles or in San Francisco, will automatically participate in the Reorganization under the Reorganization Plan, without any further action by the depositors with those institutions.

By published announcement of Sepember 15, 1931, the Reorganization Plan and Agreement has been declared operative.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee.

[fol. 516] EXHIBIT 2 TO PETITION

State of New York,
County of New York, ss:

E. E. Beach, being duly sworn upon his oath deposes and says:

I am an Assistant Secretary of Bankers Trust Company, Depositary appointed by the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and as such Assistant Secretary of said Bankers Trust Company have charge of deposits of securities of National Radiator Corporation made under that Plan and Agreement. At the date below given there are on deposit under said Plan and Agreement the below mentioned amounts of securities of National Radiator Corporation:

$10,224,500 6½% Sinking Fund Gold Debentures;
46,340 shares of $7 Cumulative Preferred Stock;
106,510 shares of Common Stock.
Dated New York, N. Y., July 18th, 1932.

E. E. Beach.

Subscribed and sworn to before me this 19th day of July, 1932. Commission expires March 30, 1934. A. W. A. Stevens, Notary Public, Westchester County. Certificate filed in N. Y. County Clerk No. 1050. Certificate filed in N. Y. County Register No. 4-S-628. (Seal.)

[fol. 517] EXHIBIT 3 TO PETITION

State of New York,
County of New York, ss:

Harold F. Linder, being duly sworn, upon his oath deposes and says: I am the Acting Secretary of the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation. A copy of said Plan and Agreement of Reorganization is annexed to the Bill of Complaint in this cause. Annexed hereto, marked respec-

tively Schedules "A", "B", "C", "D", "E", "F", "G", "H", "I", "J" and "K", are copies of various notices and communications which have been published and/or mailed to the holders of securities of National Radiator Corporation.

Copies of the Plan and Agreement of Reorganization were mailed by or at the instance of the Reorganization Committee on or about February 11, 1931, to all holders of the 6½% Debentures of National Radiator Corporation known to the Reorganization Committee, and copies of said Plan and Agreement of Reorganization were also mailed on or about said February 11, 1931, to all stockholders of record of National Radiator Corporation.

Schedule "A" was mailed by or at the instance of the aforesaid Reorganization Committee on or about February 6, 1931, to all holders of the Debentures of National Radiator Corporation known to said Reorganization Committee to announce this Committee's formation for the purpose [fol. 518] of promulgating a Plan and Agreement of Reorganization.

Schedule "B" was published on February 9, 1931, in "The New York Times", "The New York Herald-Tribune", "The New York Evening Post", "The Chicago Tribune" and in "The Buffalo News".

Schedule "C" was published on February 13, 1931, in "The New York Times", "The New York Evening Post", "The Commercial and Financial Chronicle", "The Baltimore Sun", "The Boston Herald", "The Buffalo Courier Express", "The Chicago Tribune", "The Cincinnati Enquirer", "The Cleveland Plain Dealer", "The Montreal Gazette", "The Pittsburgh Post Gazette", "The San Francisco Chronicle" and "The Toronto Globe".

Schedule "D" was mailed by or at the instance of the aforesaid Reorganization Committee on or about February 27, 1931, to all holders of the Debentures of National Radiator Corporation known to said Reorganization Committee, including those who had deposited their Debentures under the Plan and Agreement of Reorganization.

Schedule "E" was mailed by or at the instance of the aforesaid Reorganization Committee on or about March 18, 1931, to all holders of the Debentures of National Radiator Corporation known to said Reorganization Committee,

including those who had deposited their Debentures under the Plan and Agreement of Reorganization, and said Schedule "E" was also mailed to all holders of record of [fol. 519] Preferred and Common Stock of National Radiator Corporation, including those who had deposited their shares of such stock under the Plan and Agreement of Reorganization.

Schedule "F" was published on March 18, 1931, in "The New York Times", "The New York Evening Post", "The Commercial and Financial Chronicle", "The Baltimore Sun", "The Boston Herald", "The Buffalo Courier Express", "The Chicago Tribune", "The Cincinnati Enquirer", "The Cleveland Plain Dealer", "The Montreal Gazette", "The Pittsburg Post Gazette", "The San Francisco Chronicle" and "The Toronto Globe".

Schedule "G" was published on April 17, 1931, in "The New York Times".

Schedule "H" with its accompanying post card for return to the Secretary of the aforesaid Reorganization Committee was mailed by or at the instance of said Reorganization Committee on or about May 1, 1931, to all holders of the Debentures of National Radiator Corporation known to said Reorganization Committee, who had not at that date deposited their Debentures under the Plan and Agreement of Reorganization.

Schedule "I" was published on September 15, 1931, in "The New York Times", "The New York Herald-Tribune", "The Wall Street Journal", "The Baltimore Sun", "The Chicago Tribune", "The Los Angeles Times", "The Philadelphia Ledger", "The Pittsburgh Post Gazette", [fol. 520] "The San Francisco Examiner" and "The Toronto Globe".

Schedule "J" was mailed by or at the instance of the aforesaid Reorganization Committee on or about September 16, 1932, to all holders of Certificates of Deposit issued by Bankers Trust Company, Despositary under the Plan and Agreement of Reorganization, against deposits or Debentures and of shares of the Preferred and Common Stock of National Radiator Corporation, and said Schedule "J" was also mailed to all holders of the Debentures of National Radiator Corporation known to the Reorganization Committee, who had not at that date deposited their

Debentures under the Plan and Agreement of Reorganization.

Schedule "K" was published on September 16, 1931, in "The New York Times" and "The New York Herald-Tribune".

Since prior to the promulgation of the Plan and Agreement of Reorganization, the aforesaid Reorganization Committee has been diligent in endeavoring to secure the names and addresses of all holders of Debentures of National Radiator Corporation, and in this connection this Committee has been furnished with a copy of the Corporation's list of Debentureholders as compiled from the ownership certificates filed by Debentureholders in presenting coupons for payment and has also been able by correspondence and otherwise to trace the ownership of all but a relatively small amount of said Debentures. I believe that the amount of Debentures whose holders have not been [fol. 521] apprised of the Plan and Agreement of Reorganization is so small as to be practically negligible.

Harold F. Linder.

Subscribed and sworn to before me this 26th day of July, 1932. Commission expires March 30, 1934. Agnes Pendleton. Notary Public, New York County. N. Y. Co. Clk's No. 46, Reg. No. 4-P-111. (Seal.)

SCHEDULE "A"

February 6, 1931.

To the holders of National Radiator Corporation 6½% sinking fund gold debentures:

The undersigned, who have been requested by the management of National Radiator Corporation (which includes the owners and representatives of owners of substantial amounts of the Debentures and Preferred and Common Stocks of the Corporation) to formulate a Plan of Reorganization, have noted the recent announcement of a "Bondholders' Protective Committee" for the 6½% Debentures of the Corporation. The Plan which our Com-

mittee is formulating and expects to announce within the next few days, is being prepared with a view to according fair treatment to all classes of securities, and will call for deposits directly under the plan, without the intervention [fol. 522] of Protective Committees for any class of the Corporation's securities.

Rudolph B. Flershem, Vice-President the Marine Trust Company, Buffalo, N. Y. Charles O. Cornell, Cornell, Linder & Co., Inc., New York, N. Y. John H. Waters, President National Radiator Corporation, Johnstown, Pa.

SCHEDULE "B"

Reorganization of National Radiator Corporation

To the holders of 6½% sinking fund gold debentures, $7 cumulative convertible preferred stock, and common stock of National Radiator Corporation:

The undersigned have been requested by the management of National Radiator Corporation (which includes the owners and representatives of owners of substantial amounts of the Debentures and Preferred and Common Stocks of the Corporation) to formulate a Plan of Reorganization. The Plan which our Committee is formulating and expects to announce within the next few days, is being prepared with a view to according fair treatment to all classes of securities, and will call for deposits directly un- [fol. 523] der the Plan, without the intervention of protective committees for any class of the Corporation's securities. Holders of these securities are advised to defer any action until the announcement of the Plan of Reorganization.

Dated New York City, February 9, 1931.

Rudolph B. Flershem, Vice-President the Marine Trust Company, Buffalo, N. Y. Charles O. Cornell, Cornell, Linder & Co., Inc., New York, N. Y. John H. Waters, President National Radiator Corporation, Johnstown, Pa.

SCHEDULE "C"

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

To the holders of 6½% sinking fund gold debentures, $7 cumulative convertible preferred stock, and common stock of National Radiator Corporation:

National Radiator Corporation has defaulted in the payment of the interest due February 1, 1931, on its outstanding 6½% Sinking Fund Gold Debentures, the management [fol. 524] having determined that the conservation of the cash resources of the Corporation is essential to the continuance of its business operations.

The undersigned, at the request of the management (which includes the owners and representatives of owners of substantial amounts of the Debentures and Preferred and Common Stocks of the Corporation), have formulated a Plan and Agreement dated February 11, 1931 for the Reorganization of the Corporation, under which the undersigned will act as a Reorganization Committee. Other holders of large amounts of the Debentures have approved this Plan.

This Plan is recommended by the undersigned Reorganization Committee to your favorable consideration and you are urged promptly to deposit your securities thereunder with the Depositary named below, to insure that the Plan may be declared operative as soon as possible.

March 15, 1931 has been fixed as the date on or before which deposits must be made and after that date no deposit will be received, except upon such terms and conditions as the undersigned Reorganization Committee may determine.

Depositors must comply with the requirements for participation set forth in the Plan and in the form of transmittal letter available for the use of security holders. The Depositary will issue in exchange for the deposited securities transferable Certificates of Deposit.

[fol. 525] Copies of the Reorganization Plan and Agreement and of the letter of transmittal may be obtained from

the Depositary or from the Secretary to the undersigned Reorganization Committee.

Dated New York City, February 13, 1931.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Counsel: Murray, Aldrich & Webb, 15 Broad Street, New York City. Armand Erpf, Secretary. 50 Broad Street, New York City. Depositary: Bankers Trust Company, 16 Wall Street, New York City.

SCHEDULE "D"

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

Rudolph B. Flersh[illegible]m Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Armand Erpf, [fol. 526] Secretary, 50 Broad Street, New York. Murray, Aldrich & Webb, 15 Broad Street, New York, Counsel

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Excerpts from Bulletins of February 17 and 18, 1931

"Plan for reorganization of National Radiator Corporation contemplates a drastic reduction of fixed charges thus permitting the employment of liquid assets in the current conduct of the business. * * * The committee which presented the plan is headed by Mr. Rudolph B. Flershem, Chairman, and has as secretary Mr. Armand Erpf of 50 Broad Street, New York City. The depositary for this Committee is the Bankers Trust Company of 16 Wall Street, New York City.

"Although the Plan contemplates a rather drastic reduction of values held by present security holders, we believe that it is a logical one under the circumstances, inasmuch as it removes a burden of fixed charges from the company and places it in a condition to participate in any improvement in business. If the company is permitted thus to operate without excessive burdens of fixed charges, there is the

possibility that earnings will so improve as to warrant payment of interest on new debentures. It is our suggestion, therefore, that holders of the various securities assent to the Reorganization Plan. * * *

[fol. 527] "Assent should be indicated by depositing securities at the depositary, the Bankers Trust Company of 16 Wall Street, New York. March 15th has been set as the date on or before which deposits must be made and after that date no deposits will be received except upon such terms and conditions as the Reorganization Committee may determine."

February 27, 1931.

SCHEDULE "E"

Reorganization of National Radiator Corporation under Plan and Agreement dated February 11, 1931

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Armand Erpf, Secretary; 50 Broad Street, New York. Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, Counsel

March 18, 1931.

To securityholders of National Radiator Corporation:

$6,465,000 of the 6½% Debentures of National Radiator Corporation, constituting over 60% of the total issue out-[fol. 528] standing, have now been deposited under the Plan. There have also been deposited substantial amounts of the Preferred and Common Stocks.

While highly gratified at the response to the Plan, the Reorganization Committee considers that it is imperative that a substantially greater amount of Debentures be deposited before the Plan can be declared operative. Therefore, the time has been extended within which deposits may be made to the close of business April 15, 1931. Debentureholders should recognize that it is to their best interest to effect a prompt reorganization, and their failure to deposit their Debentures may seriously jeopardize the success of the Plan.

In formulating the Plan, the Reorganization Committee has recognized the paramount rights of the Debentureholders by allotting to them under the Plan all of the new company's senior securities, having the same preferential value as the present Debentures, and, in addition, 78% of the new company's common stock. Thus, practically the entire ownership and voting control of the new company become vested in the present Debentureholders.

Serious consideration was given to the advisability of liquidating the Corporation, when the Plan was being formulated. It was and still is the considered opinion of the Reorganization Committee that liquidation under existing conditions would result in a very small payment to Debentureholders and leave nothing whatsoever for stockholders.

[fol. 529] In looking forward to a continuance of operations, it is obviously sound policy to free the new company from drains upon its working capital during the period of its rehabilitation. This makes necessary a capital structure which will not burden the new company with fixed interest bearing securities until its earning power has been reestablished. For this reason the Plan provides income Debentures (carrying interest payable out of earnings but cumulative) and Preferred Stock (cumulative after three years). By virtue of their ownership of the senior securities and of the new common stock, practically all earnings of the enterprise will accrue to the benefit of the present Debentureholders.

The radiator and boiler industry has been passing through the most serious depression in its history. The difficulties arising from this depression were further aggravated, in the case of the Corporation, by the problems entailed in integrating six separate organizations into one effective unit. The Corporation's present management assumed control of its affairs February 1, 1930. This is the same management which had active charge of the old National Radiator Company of Johnstown, Pa., prior to its merger into the present Corporation in 1927, and was responsible for building up that Company over a period of years to the second largest earner in the industry. During 1930 this management has effected a substantial reduction in overhead expenses, has maintained for the Corporation a strong working capital position, and has developed

new and improved products of great promise, including, [fol. 530] among others, steel boilers, gas boilers, oil condensing sections, and concealed cast-iron radiators. It is believed that, with an increase in the volume of business, such as may be reasonably expected with a moderate improvement in economic conditions, the new company will be able to earn a profit; and it is hoped that when normal conditions are restored, earnings will be sufficient to support the payment of interest and dividends upon the new securities.

Prompt deposit of securities is urged so that the reorganization may be effected expeditiously. Delay can only prove disadvantageous in continuing the present period of uncertainty, with consequent disadvantage to securityholders. The deposit of all securities should be made with Bankers Trust Company, Depositary, 16 Wall Street, New York City. Transferable Certificates of Deposit will be issued in respect of all deposited securities.

Copies of the Reorganization Plan and Agreement and of the letter of transmittal, which should be used in making deposits, may be obtained from the Depositary or from the Secretary of the Reorganization Committee.

Rudolph B. Flershem, Chairman, Vice-President the Marine Trust Company, Buffalo, N. Y.; Charles O. Cornell, Cornell, Linder & Co., Inc., New York City, N. Y.; John H. Waters, President National Radiator Corporation, Johnstown, Pa., Reorganization Committee.

[fol. 531] SCHEDULE "F"

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

$6,455,000 of the 6½% Debentures of National Radiator Corporation, constituting over 60% of the total issue outstanding, have now been deposited under the Plan. There have also been deposited substantial amounts of the Preferred and Common Stocks.

While highly gratified at the response to the Plan, the Reorganization Committee considers that it is imperative that a substantially greater amount of Debentures be de-

posited before the Plan can be declared operative. Therefore, the time has been extended within which deposits may be made to the close of business April 15, 1931. Debentureholders should recognize that it is to their best interest to effect a prompt reorganization, and their failure to deposit their Debentures may seriously jeopardize the success of the Plan.

The deposit of all securities should be made with Bankers Trust Company, Depositary, 16 Wall Street, New York City. Transferable Certificates of Deposit will be issued in respect of all deposited securities. Prompt deposit of securities is urged so that the reorganization may be effected expeditiously.

Copies of the Reorganization Plan and Agreement and of the letter of transmittal, which should be used in making deposits, may be obtained from the Depositary or from [fol. 532] the Secretary of the Reorganization Committee. A letter dealing with the necessity for the Plan and reviewing its salient features has been prepared and is available for distribution.

Dated New York City, March 18, 1931.

Rudolph B. Flershem, Chairman, Vice-President the Marine Trust Company, Buffalo, N. Y.; Charles O. Cornell, Cornell, Linder & Co., Inc., New York, N. Y.; John H. Waters, President National Radiator Corporation, Johnstown, Pa., Reorganization Committee. Counsel: Milbank, Tweed, Hope & Webb, 15 Broad Street, New York City. Armand Erpf, Secretary, 50 Broad Street, New York City.

SCHEDULE "G"

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

Deposits to date amount to more than 70% of the outstanding Debentures and 59% of the outstanding Preferred Stock and a substantial percentage of the outstanding Com- [fol. 533] mon Stock of National Radiator Corporation, showing a marked increase for each class of security over deposits last announced.

In order to afford the holders of undeposited securities a further opportunity to participate in the Reorganization, the time within which deposits will be received under the Plan has been extended to the close of business May 30, 1931.

Deposits should be made with the Bankers Trust Company, Depositary, 16 Wall Street, New York City. Transferable Certificates of Deposit will be issued in respect of all deposited securities. Copies of the Plan and Agreement of Reorganization and of the letter of transmittal, which should be used in making deposits, may be obtained from the Depositary or from the Secretary of the Reorganization Committee.

Dated New York City, April 17, 1931.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Counsel: Milbank, Tweed, Hope & Webb, 15 Broad Street, New York City. Armand Erpf, Secretary, 50 Broad Street, New York City.

[fol. 534] SCHEDULE "H"

To the holders of 6½% sinking fund gold debentures of National Radiator Corporation:

74.6% of these Debentures have now been deposited under the Reorganization Plan and Agreement with Bankers Trust Company, the Depositary, at 16 Wall Street, New York City.

It is important that a substantially larger percentage of these Debentures be deposited prior to the expiration of the period for deposits, now extended to the close of business May 30, 1931.

You will greatly assist the Reorganization Committee by filling out and returning to the undersigned the enclosed post card.

May 1, 1931.

Reorganization Committee of National Radiator Corporation. Armand Erpf, Secretary, 50 Broad Street, New York City.

6½% Debentures of National Radiator Corporation

☐ I am not now a holder of these Debentures.

☐ I have deposited my Debentures and hold Certificate of Deposit No. —.

☐ I intend to deposit my Debentures with Bankers Trust Company, the Depositary, 16 Wall Street, New York City, prior to May 30, 1931.

Name: —— ——, Address: ——.

[fol. 535] SCHEDULE "I"

Reorganization of National Radiator Corporation

Notice that Plan Has Been Declared Operative

Deposits to date under the Reorganization Plan and Agreement dated February 11, 1931, amount to more than 81% of outstanding Debentures and substantial percentages of the two classes of outstanding stock of National Radiator Corporation. Accordingly, the Reorganization Committee have declared said Plan operative.

No security holder will be entitled to participate in the Plan unless his Debentures or stock are deposited with Bankers Trust Company, Depositary. Securities not heretofore deposited will be accepted up to the close of business October 15, 1931. Thereafter deposits will be received only upon payment at the time of deposit of such penalties as may be imposed by the Reorganization Committee, who reserve power in their discretion at any time and from time to time to increase such penalties.

Bankers Trust Company, 16 Wall Street, New York, is the sole Depositary for all classes of securities under the Reorganization Plan. Copies of the Reorganization Plan [fol. 536] and Agreement may be obtained from the Depositary or from the Secretary of the Reorganization Committee.

Dated New York, September 15, 1931.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Counsel: Milbank, Tweed, Hope & Webb, 15 Broad Street, New York. Armand Erpf, Secretary, 50 Broad Street, New York.

SCHEDULE "J"

Reorganization of National Radiator Corporation under Plan and Agreement, Dated February 11, 1931

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Armand Erpf, Secretary, 50 Broad Street, New York City. Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, Counsel.

[fol. 537] New York, September 16, 1931.

To security holders of National Radiator Corporation:

The Reorganization Committee acting under the above-mentioned Plan and Agreement has augmented said Plan by the following supplementary provisions to Article III thereof.

In respect of the description of the 15-Year 5% Debentures to be authorized by the New Company provided for in said Plan:

(a) In the Indenture under which said Debentures will be issued the New Company will also covenant that so long as any of the New Debentures are outstanding it will not mortgage or pledge any of its property or assets to secure any funded debt as defined in the Indenture without simultaneously making provisions for securing such New Debentures by a prior lien upon such property or assets. The Indenture aforesaid shall contain clauses in this regard substantially similar to those contained in Paragraph B of Section 11 of Article IV of the Indenture dated August 1, 1927, under which are now outstanding National Radiator Corporation's 6½% Sinking Fund Gold Debentures.

(b) The Indenture under which the New Debentures are to be issued shall provide that for the purpose of defining net earnings of the New Company, out of which current and unpaid accumulated interest on said New Debentures will [fol. 538] be payable, there shall not be deductible in excess of $300,000 for depreciation in the calendar year 1934 or in any calendar year thereafter.

(c) The Indenture aforesaid shall contain clauses substantially similar to those recited in Article V of the In-

denture dated August 1, 1927, under which are now outstanding National Radiator Corporation's 6½% Sinking Fund Gold Debentures, to that effect that

(1) it shall constitute an event of default should the New Company fail in the observance of any of the covenants or agreements on its part to be performed and the same shall not be remedied within 60 days after written notice of such default shall have been served upon said New Company by the Trustee acting under said Indenture; and

(2) default having occurred as aforesaid, the Trustee acting under said Indenture may in its discretion, and, upon request in writing by the holders of at least 25% in principal amount of the New Debentures then outstanding, shall, upon indemnification satisfactory to it, declare the principal of and interest on all said New Debentures, if not already due, to be forthwith due and payable; and

(3) nothing in said Indenture or in the New Debentures or in the coupons attached thereto shall affect or impair the obligation of the New Company to pay the principal and [fol. 539] interest of the New Debentures to the respective holders or registered owners thereof as in such Debentures and coupons stated nor affect or impair the right of action at law of such holders to enforce such payment by virtue of the contract contained in the New Debentures and not by virtue or availing of any provision of the Indenture.

(d) The Indenture aforesaid shall also provide that it shall be an event of default should the net current assets of the New Company, computed according to standard accounting practice, be at the end of any calendar year commencing with the calendar year 1934, less than 55% of the principal amount of the New Debentures at the time outstanding. In the event of such default, the remedies of the Trustee acting under said Indenture shall be as set forth in subdivision (2) of paragraph (c) above.

In respect of the $7 Preferred Stock to be authorized by the New Company provided for in said Plan:

(e) Funds legally available for dividends shall be limited to surplus profits or net earnings arising after the organization of the New Company and in no event shall be comprised of paid-in-surplus.

(f) In the calculation of surplus profits or net earnings, available for dividends in any calendar year, deduction shall first be made therefrom of the earnings during such year payable as debenture interest.

[fol. 540] The Reorganization Plan and Agreement, as augmented by the foregoing supplementary provisions, has been approved and adopted by the Bondholders' Protective Committee constituted under the Deposit Agreement dated as of February 2, 1931. A member of said Protective Committee will become a member of the Reorganization Committee, as well as of the Board of Directors of the New Company provided for in the Reorganization Plan. The Debentures on deposit with said Protective Committee are of substantial amount and, together with the Debentures already on deposit under the Reorganization Plan, exceed 90% of the entire issue of National Radiator Corporation Debentures outstanding. Security holders who have not as yet deposited under the Reorganization Plan should do so at once. No security holder whose Debentures or stock certificates are not deposited under the Reorganization Plan will be entitled to participate in its benefits.

The deposit of all classes of securities should be made with Bankers Trust Company, Depositor, 16 Wall Street, New York. Transferable Certificates of Deposit will be issued by said Depositary in respect of all deposited securities. Debentures now on deposit with Empire Trust Company, in New York, or with the Chicago Trust Company, in Chicago, or with the Bank of America National Trust and Savings Association, in Los Angeles or in San Francisco, will automatically participate in the Reorganization under the Reorganization Plan, without any further action by the depositors with those institutions.

[fol. 541] By published announcement of September 15, 1931, the Reorganization Plan and Agreement has been declared operative.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee.

SCHEDULE "K"

Reorganization of National Radiator Corporation under Reorganization Plan and Agreement Dated February 11, 1931

The Bondholders' Protective Committee constituted under the Deposit Agreement dated as of February 2, 1931, advises that it has approved and adopted the above Plan and Agreement, as augmented by certain supplementary provisions, and said Committee is today publishing announcement of such approval and adoption. The Debentures on deposit with said Committee, together with the Debentures heretofore deposited with the undersigned Reorganization Committee, exceed 90% of the entire issue of National Radiator Corporation Debentures outstanding.

A statement of the supplementary provisions to the Plan is on file at Bankers Trust Company, Depositary, 16 Wall [fol. 542] Street, New York, and copies thereof may be had on application to said Depositary or to the Secretary of the undersigned Reorganization Committee.

Additional deposits will be accepted up to the close of business October 15, 1931.

New York, September 16, 1931.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Counsel: Milbank, Tweed, Hope & Webb, 15 Broad Street, New York. Armand Erpf, Secretary, 50 Broad Street, New York.

Bondholders' Protective Committee

National Radiator Corporation

Six and One-half per cent. Sinking-fund Gold Debentures

To the holders of the above debentures:

The undersigned Committee has approved and adopted the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, as augmented by certain supplementary provisions. A copy of [fol. 543] said Reorganization Plan and Agreement as so augmented has been lodged with the Empire Trust Company, Depositary, 120 Broadway, New York, and other

copies may be obtained from said Depositary or from the Secretary of this Committee or from the Secretary of said Reorganization Committee.

All Debentures now on deposit with this Committee, under its Deposit Agreement dated as of February 2, 1931, will automatically participate in the Reorganization under the Reorganization Plan, without any further action by the depositors thereof. Holders of Certificates of Deposit for such Debentures, at the expiration of 30 days from the date hereof, unless such Debentures are previously withdrawn from deposit as in said Deposit Agreement provided, shall be conclusively deemed irrevocably to have waived any right of withdrawal and to have fully and finally assented to and adopted the aforesaid Reorganization Plan and Agreement and shall be bound by all the terms and provisions thereof, without further act or notice. All Debentures not withdrawn within such 30 days period will be delivered by this Committee to Bankers Trust Company, Depositary, 16 Wall Street, New York, for deposit under the Reorganization Plan and Agreement as augmented, or, if not so delivered, will be made subject to its order as the Depositary for all securities under said Plan.

This Committee recommends adoption of the Reorganization Plan as augmented and urges the prompt deposit under the Reorganization Plan of all Debentures not as yet [fol. 544] deposited. A member of this Committee joins the Reorganization Committee and will become a member of the Board of Directors of the New Company provided for in the Reorganization Plan.

New York, September 16, 1931.

Charles C. Hood, Chairman; Bernhard A. Bernstorf, Frank B. Cahn, Earle C. Reed, Henry F. Whitney, Committee. Olcott, Holmes, Glass, Paul & Havens, Counsel, 170 Broadway, New York, N. Y. Milton E. Cornelius, Secretary, 160 Broadway, New York, N. Y.

IN UNITED STATES DISTRICT COURT

RECEIVERS' REPORT OF SALE—Filed Aug. 12, 1932

To the Honorable the Judges of said Court:

The undersigned Robert S. Waters and William G. Heiner, appointed on October 9, 1931, as Receivers of the

above named National Radiator Corporation and, in and by the Final Decree of Sale made and entered in this cause May 31, 1932 (hereinafter called the "Final Decree"), ordered to make the sale of the property and assets of said Corporation directed by said Final Decree, do hereby respectfully report:

1. Neither the defendant National Radiator Corporation (hereinafter called the "Corporation") nor anyone on its [fol. 545] behalf nor anyone else, within 10 days after the entry of the Final Decree or at any other time, has paid or caused to be paid, in accordance with the provisions of Section 29 of the Final Decree, the sum specified in said Section 29 or any part thereof.

2. The day and hour for the sale directed by the Final Decree were named by your Receivers, on request of the solicitors for the complainants as provided in Section 33 of the Final Decree, for Monday, August 8, 1932, at 11:30 o'clock A. M., Eastern Standard Time, and notice of the said time and of the place and terms of said sale, such notice containing a brief and general description of the property to be sold and referring intending purchasers for a more particular description of such properties and of the terms of sale to the Final Decree and to the records in the above entitled cause and to your Receivers' Statement then to be filed and now on file with the Clerk of this Court, as required by the Final Decree, was published once each week for 4 successive weeks prior to such sale, to wit: On July 6, July 13, July 20, and July 27, in at least one daily newspaper printed, regularly issued and having a general circulation in each of the cities hereinafter named, viz.:

New York, N. Y., New York Evening Post;
Buffalo, N .Y., Buffalo Courier Express;
Boston, Mass., Boston Herald;
Baltimore, Md., Baltimore News;
Washington, D. C., Washington Herald;
Richmond, Va., Richmond Times Dispatch;
Trenton, N. J., Trenton Times;
[fol. 546] Pittsburgh, Pa., Pittsburgh Press;
Johnstown, Pa., Johnstown Tribune;
Cincinnati, Ohio, Cincinnati Enquirer;
Chicago, Ill., Chicago Post,

and also in the City of Pittsburgh, Pa., in the Pittsburgh Legal Journal; in each instance the particular newspapers having been selected by the solicitors for the complainants in this cause. There is attached hereto marked Schedule A and made a part of this Report a copy of said notice of sale so published in said respective newspapers and affidavits of the publication of the same by the respective publishers of said newspapers.

4. On June 11, 1932, said date being not more than 2 weeks after the entry in this cause of the Final Decree, your Receivers, pursuant to Section 53 of the Final Decree, filed in this cause their schedule setting forth specifically and in reasonable detail all the property and assets of the Corporation, to the extent not fully itemized in the schedule attached to their First Report filed herein January 2, 1932, and of such as since the date of said First Report has been disposed of.

4. On July 28, 1932, said date being at least 10 days and not more than 20 days prior to the date fixed for the sale directed by the Final Decree, your Receivers filed in this cause their Receivers' Statement required by Section 54 of the Final Decree.

5. On July 30, 1932, said date being more than 24 hours prior to the offering by your Receivers of any property for sale under the Final Decree as hereinafter in paragraphs 8 [fol. 547] set forth, G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, deposited with your Receivers, in order to qualify themselves to bid for all the property to be offered for sale under the Final Decree, both when offered in separate parcels and when all of said property should be offered for sale as an entirety as Parcel K, and as a pledge that they would make good their bid or bids in case of the acceptance of the same, a certificate dated July 27, 1932, of Bankers Trust Company, a trust company organized under the laws of the State of New York, having its principal office and place of business in said State at 16 Wall Street, in the City of New York, a trust company acceptable to your Receivers, which certificate stated that said trust company held subject to the order of your Receivers the below-mentioned Debentures and appurtenant coupons:

$1,000,000 principal amount of 6½% Sinking Fund Gold Debentures of National Radiator Corporation, in bearer form and accompanied by the coupons thereto appertaining due February 1, 1931, and all subsequently maturing coupons.

Said deposit of Debentures and coupons was sufficient under the provisions of Section 37 of the Final Decree to qualify the aforesaid G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, to bid for all the property to be offered for sale under the Final Decree, both when offered in separate parcels and when all of said property should be offered for sale as an entirety as Parcel K. The aforesaid certificate of said deposit has been deposited by your Receivers and is now [fol. 548] held by your Receivers on deposit with the Mellon National Bank, a national bank, having its principal office and place of business at 514 Smithfield Street, in the City of Pittsburgh, Pennsylvania, subject to the order of this Court.

6. On July 30, 1932, and prior to the offer by your Receivers of any property for sale under the Final Decree as hereinafter in paragraph 9 set forth, G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common filed with your Receivers in accordance with Section 36 of the Final Decree a statement that they proposed to bid on behalf of and for the benefit of a corporation or corporations organized or to be organized with the intention that such corporation or corporations shall become the owner or owners of the property to be sold under the Final Decree or some part thereof or some beneficial interest therein, pursuant to a Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, as augmented by the provisions set forth in a certain letter dated September 16, 1931, issued by the Reorganization Committee constituted under said Plan and Agreement and made a part thereof, and that on July 29, 1932, there had been filed with the Clerk of this Court and entitled in this cause a petition duly verified for the approval by this Court of said Plan and Agreement, as so augmented, together with a complete copy of said Plan and Agreement as so augmented and a complete statement of what notice had been given of the same by publication

and otherwise to persons and corporations interested in [fol. 549] National Radiator Corporation and its properties. A copy of said statement, together with a copy of said Plan and Agreement as so augmented, is also filed herewith marked Schedule B and hereto attached is made a part of this Report.

7. On August 1, 1932, and prior to the offer by your Receivers of any property for sale under the Final Decree as hereinafter in paragraph 9 set forth, the following persons, respectively, qualified as bidders for the following parcels, in accordance with Section 36 of the Final Decree, by filing with your Receivers, on July 25, 1932, a statement of each of said persons that he did not propose to bid for any of said property pursuant to or for the purpose of any plan and agreement or reorganization of National Radiator Corporation and by depositing with your Receivers, on and prior to August 1, 1932, pursuant to Section 37 of the Final Decree, the following securities and cash as pledges that they, respectively, would make good their bid or bids:

Name	Parcel	Deposit
William R. Stockwell	B, D, E, G, I	6½% Sinking Fund Gold Debentures of National Radiator Corporation, in bearer form, and coupons thereto appertaining, in the aggregate amount of $35,233.50; also, cash in the amount of $18.50
Harry G. Naylor	C	6½% Sinking Fund Gold Debentures of National Radiator Corporation, in bearer form, and coupons thereto appertaining, in the aggregate amount of $7,003.75; also cash in the amount of $7.75
Chas. Linhardt, Jr.	F, H, J	6½% Sinking Fund Gold Debentures of National Radiator Corporation, in bearer form, and coupons thereto appertaining, in the aggregate amount of $2,000.

[fol. 550]

8. On August 8, 1932, at 11:30 o'clock A. M., Eastern Standard Time, on the steps at the main entrance of the Courthouse of Lawrence County, in the City of New Castle, Commonwealth of Pennsylvania, being the time and place fixed by or as provided in the Final Decree and being at the County Courthouse of the County of Lawrence wherein the greater part of the real estate owned by National Radiator Corporation and/or its Receivers and to be sold is situated, your Receivers personally attended, and, with William G. Heiner, one of said Receivers, acting as auctioneer, offered for sale at public auction in the manner prescribed in the Final Decree and as hereinafter in paragraph 9 set forth and subject to all the provisions of the Final Decree the property by the Final Decree directed to be sold.

9. Mr. Heiner first read the notice of sale, including the description of the property to be sold therein contained, and for a fuller description of said property referred those [fol. 551] present to Schedule A annexed to the Final Decree. Sidney J. Watts, Esq., of Baker and Watts, Pittsburgh, Pennsylvania, solicitors for First National Bank of Cincinnati, Intervenor in this cause, who was present, orally requested your Receivers to postpone the sale to some later date because of an appeal taken by said Intervenor and International Heater Company, also an intervenor in this cause, from the Final Decree. Counsel for your Receivers inquired of Mr. Watts whether he had any further reason to adduce for the postponement requested by him, and Mr. Watts replied in the negative. Counsel for your Receivers then inquired further of Mr. Watts whether said Intervenors had filed a supersedeas bond in their said appeal, to which inquiry, also, Mr. Watts replied in the negative. At this point G. Franklin Ludington, Esq., of New York, said that he, the said G. Franklin Ludington, and Carl E. Resley had qualified as bidders for all the parcels to be sold, had come from a distance for the purpose of bidding thereon, and desired the sale presently to proceed as directed by the Court. On advice of their counsel, your Receivers refused to accede to the request of Mr. Watts and proceeded with the sale as directed to be held in the Final Decree. Thereupon

(a) Mr. Heiner first offered for sale separately and as an entirety, under and subject to the provisions of the Final

Decree, all of the property comprised in Parcel A described in the notice of sale. The highest bid for said Parcel A, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants [fol. 552] in common, and was $2,392,000 and your Receivers noted said bid as provided in the Final Decree;

(b) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel B described in the notice of sale. The highest bid for said Parcel B, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $40,000 and your Receivers noted said bid as provided in the Final Decree;

(c) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel C described in the notice of sale. The highest bid for said Parcel C, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $25,000 and your Receivers noted said bid as provided in the Final Decree;

(d) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel D described in the notice of sale. The highest bid for said Parcel D, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $40,000 and your Receivers [fol. 553] noted said bid as provided in the Final Decree;

(e) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel E, described in the notice of sale. The highest bid for said Parcel E, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $32,000 and your Receivers noted said bid as provided in the Final Decree;

(f) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel F described

in the notice of sale. The highest bid for said Parcel F, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $3,000 and your Receivers noted said bid as provided in the Final Decree;

(g) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel G described in the notice of sale. The highest bid for said Parcel G, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $5,000 and your Receivers noted said bid as provided in the Final Decree;

[fol. 554] (h) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel H described in the notice of sale. The highest bid for said Parcel H, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $5,000 and your Receivers noted said bid as provided in the Final Decree;

(i) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel I described in the notice of sale. The highest bid for said Parcel I, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $3,000 and your Receivers noted said bid as provided in the Final Decree;

(j) Mr. Heiner next offered for sale separately and as an entirety, under and subject to the provisions of the Final Decree, all of the property comprised in Parcel J described in the notice of sale. The highest bid for said Parcel J, when offered separately, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $5,000 and your Receivers noted said bid as provided in the Final Decree;

(k) Mr. Heiner finally offered for sale separately and as an entirety, under and subject to the provisions of the Final [fol. 555] Decree, all of the property comprised in Parcels

A, B, C, D, E, F, G, H, I and J, inclusive, as Parcel K. The highest bid for said Parcel K, when offered separately and as an entirety, was made by G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, and was $2,550,000 and your Receivers noted said bid as provided in the Final Decree.

The bid noted for the property comprising Parcel K when offered separately as an entirety equalled the aggregate of the highest bids for said property when offered for sale in the separate Parcels A, B, C, D, E, F, G, H, I and J. Your Receivers, therefore, in accordance with the provisions of the Final Decree, cancelled and rejected the bids noted for said Parcels A, B, C, D, E, F, G, H, I and J, and accepted the bid noted for said Parcel K, and Mr. Heiner thereupon on behalf of your Receivers struck off and, subject to the provisions of the Final Decree and to confirmation by order of this Court and of the ancillary courts having jurisdiction in this matter, sold as an entirety all of the property comprised in Parcel K to G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, for the aforesaid sum of $2,550,000, they being the highest bidders therefor.

10. At the conclusion of the sale G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, executed a Memorandum of Sale, which is filed herewith, a copy thereof being attached hereto marked [fol. 556] Schedule C and made a part of this Report.

Dated New Castle, Pa., August 8, 1932.

Respectfully submitted.

Robert S. Waters, William G. Heiner, as Receivers and Ancillary Receivers.

Duly sworn to by Robert S. Waters and William G. Heiner. Jurat omitted in printing.

[fol. 557] IN UNITED STATES DISTRICT COURT

PETITION OF NATIONAL RADIATOR CORPORATION, A MARYLAND CORPORATION, FOR CONFIRMATION OF SALE—Filed Aug. 17, 1932

To the Honorable the Judges of said Court:

1. Your petitioner is a corporation duly organized and existing under the laws of the State of Maryland.

2. G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, have heretofore purchased, subject to the provisions of the Final Decree of Sale made and entered by this Court in the above entitled cause May 31, 1932 (hereinafter called the "Final Decree") and subject to confirmation of said sale by this Court and by the other courts in which are pending causes similarly entitled and ancillary thereto, at a sale held August 8, 1932, all of the property in and by the Final Decree directed to be sold.

3. By an Assignment of Bid dated August —, 1932, said G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, have assigned, transferred and set over unto your petitioner all their right, title and interest in and to the property purchased by them at said sale; their right to receive a deed or deeds or other instrument or instruments of conveyance or assignment and transfer of said property; their successful bid at the sale under the Final Decree; their rights and interests under the Final Decree as the successful bidders for said property; [fol. 558] and their right to receive cash (less the sum of $300,000 to be retained by the Receivers hereinafter mentioned), current assets, materials and supplies, all as provided in the Final Decree.

Wherefore your petitioner joins in the prayer of the petition of G. Franklin Ludington and Carl E. Resley dated and filed herein August 17, 1932, and prays that the Receivers appointed by this Court by Decree No. 1 in this cause dated October 9, 1931, and in and by the Final Decree ordered to execute the sale directed by the Final Decree, be now directed in accordance with the Final Decree to execute and deliver to your petitioner a deed or deeds of said property in form to be approved by this Court; that the defendant National Radiator Corporation, the Delaware corporation, be directed to join with said Receivers in the execution and delivery of said deed or deeds to your petitioner, thereby to convey, transfer, assign and release to your petitioner the property heretofore belonging to said defendant National Radiator Corporation and/or its Receivers and sold under and pursuant to the Final Decree; and that said Receivers by way of further assurance be directed to assign, transfer and deliver to your petitioner all cash (less

the sum of $300,000 to be retained by them as in Section 43 of Article X of the Final Decree provided, as a payment on account of the total purchase price of said property sold) and all current assets, materials and supplies in the possession of said Receivers at the date of the delivery of pos-
[fol. 559] session to your petitioners under said deed or deeds.

Dated August 17, 1932.

National Radiator Corporation (a Maryland Corporation), by Jno. H. Waters, President. Reed, Smith, Shaw & McClay, Solicitors for the Above-named National Radiator Corporation. Milbank, Tweed, Hope & Webb, of Counsel.

IN UNITED STATES DISTRICT COURT

PETITION OF PURCHASERS FOR CONFIRMATION OF SALE—Filed Aug. 17, 1932

To the Honorable the Judges of said Court:

The petition of G. Franklin Ludington and Carl E. Resley respectfully shows to this Court and alleges:

1. Your petitioners are the Purchasers of the property sold under the Final Decree of Sale made and entered by this Court in the above entitled cause May 31, 1932 (hereinafter called the "Final Decree") and, by authority granted to them by Section 49 of Article XII of the Final Decree as said Purchasers have heretofore entered their appearance in this cause.

2. Robert S. Waters and William G. Heiner, as Receivers appointed by this Court by Decree No. 1 in this cause dated October 9, 1931, and in and by the Final Decree ordered to
[fol. 560] execute the sale directed by said Final Decree, after having given by advertisement public notice of said sale, on August 8, 1932, at 11:30 o'clock A. M. (Eastern Standard Time), at the place and in the manner in the Final Decree provided, sold at public auction to your petitioners, as joint tenants and not as tenants in common, subject to the provisions of the Final Decree and to confirmation of said sale by this Court and by the other Courts in which are pending causes similarly entitled and ancillary thereto,

all the property in and by the Final Decree directed to be sold in one parcel as an entirety for the sum of $2,550,000. Said sum was bid by your petitioners as joint tenants and not as tenants in common for all said property in one parcel as an entirety and was the highest and best bid made therefor. Thereafter the aforesaid Receivers filed their Report of Sale herein, to be received and heard by this Court as in Section 34 of Article VI of the Final Decree provided.

3. By an Assignment of Bid dated August 16, 1932, a copy of which is annexed hereto and made a part of this petition as Exhibit A, your petitioners have assigned, transferred and set over unto National Radiator Corporation, a Maryland corporation, all their right, title and interest in and to the property purchased by them at the sale aforesaid; their right to receive a deed or deeds or other instrument or instruments of conveyance or assignment and transfer of said property; their successful bid at the sale under the Final Decree; their rights and interests under the Final Decree as the successful bidders for said property; and their right to receive cash (less the sum of $300,000 to be [fol. 561] retained by the aforesaid Receivers), current assets, materials and supplies, all as provided in the Final Decree.

Wherefore your petitioners pray that the Receivers' Report of Sale aforesaid be in all things confirmed; that the sale therein reported be in all respects approved, confirmed and made final and absolute and that all persons shall be barred from hereafter making any complaint thereto; that said Receivers and the defendant National Radiator Corporation, the Delaware corporation, be directed in accordance with the Final Decree to execute and deliver to National Radiator Corporation, the Maryland corporation, as the assignee of your petitioners, a deed or deeds in form to be approved by this Court; and that such other and further relief be granted as to this Court may seem proper.

Dated August 17, 1932.

G. Franklin Ludington, Carl E. Resley, Purchasers.
Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for Petitioners. Milbank, Tweed, Hope & Webb, of Counsel.

EXHIBIT "A" TO PETITION

Assignment of bid, dated August 17, 1932, between G. Franklin Ludington and Carl E. Resley (hereinafter called [fol. 562] the "Purchasers"), parties of the first part, and National Radiator Corporation (hereinafter called the "Grantee"), a corporation organized and existing under the laws of the State of Maryland, party of the second part:

Whereas, at a sale (hereinafter called the "sale") held pursuant to a Final Decree of Sale (hereinafter called the "Final Decree") made and entered in the District Court of the United States for the Western District of Pennsylvania (hereinafter called the "Pennsylvania Court") May 31, 1932, in the cause therein pending entitled "Rudolph B. Flershem and others, as a Reorganization Committee, etc., Complainants, against National Radiator Corporation, Defendant, No. 2558 In Equity" (hereinafter called the "receivership cause") and pursuant to ancillary final decrees of sale made in causes ancillary to said receivership cause, the Purchasers, as joint tenants and not as tenants in common, were the successful bidders, subject to the provisions of the Final Decree and subject to the confirmation of the sale by the Pennsylvania Court and by the other courts having jurisdiction of the causes ancillary to the receivership cause, for all the property in and by the Final Decree directed to be sold, in one parcel as an entirety, for the sum of $2,550,000; and

Whereas, said bid was made on behalf and for the benefit of the Grantee, pursuant to and for the purposes of the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation; and

[fol. 563] Whereas, the Purchasers desire to assign their successful bid at the sale to the Grantee;

Now, therefore, this indenture witnesseth:

That for good and valuable considerations the Purchasers have transferred, assigned and set over and hereby assign, transfer and set over unto the Grantee all their right, title and interest in and to the property of every kind, character and description purchased by them at the sale; their right to receive a deed or deeds or other instrument or instruments of conveyance or assignment and transfer of said property; their successful bid at the sale under the Final Decree; their rights and interests under

the Final Decree as the successful bidders for said property; and their right to receive all cash (less the sum of $300,000 to be retained by the Receivers, as in Section 43 of Article X of the Final Decree provided, as a payment on account of the total purchase price of said property sold) and all current assets, materials and supplies in the possession of the Receivers, all as provided in the Final Decree.

To have and to hold the same unto the Grantee, its successors and assigns, to its and their own use forever.

Subject, however, to all the terms, conditions and reservations of the Final Decree.

And this indenture further witnesseth:

That the Grantee hereby for itself, its successors and assigns, covenants and agrees with the Purchasers, and [fol. 564] with each of them, that the Grantee will enter its appearance in the above entitled cause and will take over and perform, or cause to be performed, the bid and purchase of the Purchasers and will, as part of the purchase price for said property, assume and pay all obligations of the Receivers under existing executory contracts, leases and agreements entered into, assumed or adopted by the Receivers, to the extent that the same shall not have been performed by the Receivers and are required to be assumed by the Purchasers; and will indemnify and forever hold harmless the Purchasers, and each of them, and the survivor of them, and each and every of the heirs, executors and administrators of the Purchasers and of either of them, from and against any and all loss, damage, expense and liability whatever which may have been incurred, or which may hereafter be incurred, by the Purchasers, or either of them, or the survivor of them, or the heirs, executors and administrators of the Purchasers, or of either of them, by reason of the failure of the Grantee to perform its undertaking herein contained.

And this indenture further witnesseth:

That the assignment and transfer by the Purchasers herein contained is subject to the performance by the Grantee of its undertaking herein contained in all respects.

In witness whereof, G. Franklin Ludington and Carl E. Resley have hereunto set their hands and seals, and National Radiator Corporation, the Maryland corporation, [fol. 565] has caused this Assignment of Bid, evidencing

also its undertaking herein contained, to be executed by its President or one of its Vice Presidents and its corporate seal to be hereunto affixed and attested by its Secretary or one of its Assistant Secretaries, all as of the day and year first above written.

G. Franklin Ludington (L. S.), Carl E. Resley, (L. S.), Purchasers. National Radiator Corporation, by Jno. H. Waters, President.

Attest:
Carl E. Resley, Secretary. (Corporate Seal National Radiator Corporation, Maryland, 1932.)

IN UNITED STATES DISTRICT COURT

ANSWER TO PETITION FOR APPROVAL OF PLAN—Filed Aug. 17, 1932

And Now, to wit, August 18th, 1932, come the First National Bank of Cincinnati, Ohio, by Ehrich, Royall, Wheeler & Walter and Baker & Watts, their Counsel, and the International Heater Company, by Miller & Hubbell and Alter, Wright & Barron, their Counsel, and, in answer to the petition filed by the complainants in the above action praying [fol. 566] that this Court approve the plan and agreement of reorganization referred to in said petition as fair and equitable and adjudicate that said plan and agreement provide an equitable and timely offer of participation in the reorganization thereby proposed to all persons and corporations interested in National Radiator and its property, respectfully submit as follows:

One. That it already appears by the pleadings and evidence before this Court that said plan is not fair and equitable.

Two. That if this Court thinks that it does not now sufficiently appear from the pleadings and evidence already introduced that said plan is not fair and equitable, then it certainly is true that there has never been any hearing for the purpose of determining that question, and if it is the intention of this Court to pass upon that question, then the parties interested are entitled to present their evidence

upon that point, and a time should be fixed for a hearing, at which the evidence can be taken, so that this Court can pass upon said question intelligently.

Three. That many of these inequitable and unfair features of the plan of reorganization have already been clearly expressed in a printed circular letter of a Bondholders' Protective Committee, of which Mr. Frank B. Cahn, now a member of the Reorganization Committee, was one. There is attached to the petition herein a modification of the reorganization plan correcting some of the unfairness pointed out in this letter, but no copy of the letter is attached to the petition for the information of this [fol. 567] Court, and the most important elements of unfairness pointed out in said letter still remain unchanged. A copy of said letter is hereto attached and made a part hereof.

Four. That the plan of reorganization outlined in the petition for the approval thereof is unfair, and such petition contemplates the abuse of the powers of this Court in Equity for the mere purpose of effectuating the proposed plan of reorganization in fraud of the rights of non-assenting creditors, including these answering respondents. The said plan is also unfair in that it accomplishes the turning over of the property of the defendant corporation to the Reorganization Committee at a grossly inadequate price, and in that it makes provision for the preferred stockholders of the old corporation granting them rights unconditionally, and for the common stockholders conferring rights upon them upon their making contributions wholly inadequate and trivial in amount, notwithstanding that the accomplishment of the plan will bring about the turning over of the property of the corporation for the benefit of the stockholders at a price not only grossly inadequate, but also insufficient to pay but a small percentage of the claims of the dissenting creditors.

Five. The final decree of sale herein dated May 31st, 1932, was made in contemplation of the complainants' plan of reorganization and this suit was brought as a mere step for the purpose of effectuating such plan. These respondents hereby reassert all of their exceptions and assignments of error, heretofore filed, to the chief decree, which

is the final decree of sale dated May 31st, 1932, and hereby [fol. 568] incorporate all of such exceptions and assignments of error as though herein again fully set forth.

First National Bank of Cincinnati, Ohio, by Baker & Watts, Ehrich, Royall, Wheeler & Walter, Their counsel, Sidney J. Watts, of Counsel. International Heater Company, by Miller & Hubbell, Alter, Wright & Barron, Their Counsel. Gifford K. Wright, of Counsel.

Bondholders' Protective Committee

National Radiator Corporation

6½% Sinking-fund Gold Debentures

Committee: Charles C. Hood, Chairman, Charles C. Hood & Co.; Bernard A. Bernstorf, Frank B. Cahn, Frank B. Cahn & Co., Members of the New York Stock Exchange; Henry F. Whitney, Vice-Pres. [fol. 569] Empire Trust Company. Depositaries: Empire Trust Company, 120 Broadway, New York, N. Y.; Chicago Trust Company, 134 South La Salle Street, Chicago, Illinois; The Bank of America National Trust and Savings Association, 7th and Spring Streets, Los Angeles, Calif.; 477 California Street, San Francisco, Calif. Counsel: Olcott, Holmes, Glass, Paul & Havens, 170 Broadway, New York, N. Y. Consulting Engineers: Coverdale & Colpitts, 120 Wall Street, New York, N. Y. Accountants: Barrow, Wade, Guthrie & Co., 120 Broadway, New York, N. Y. Secretary: Milton E. Cornelius, 160 Broadway, New York, N. Y.

February 28, 1931.

To the holders of the above bonds:

The undersigned Committee has carefully considered the Plan of Reorganization, dated Feruary 11, 1931, sponsored by the present management of National Radiator Corporation and has unanimously decided that this Plan should be opposed by the Debenture holders. You are, accord-

ingly, urged not to deposit your Debentures under said Plan.

[fol. 570] A summary of the reasons leading to the above conclusion is herewith presented:

(1) Loss of First Mortgage Position.—The Debentures are now equally as good as first mortgage bonds. The Company owes only a negligible amount of indebtedness in addition to the Debenture debt. There is no other funded debt. Under the present Indenture no mortgage or pledge of the Company's properties is permitted except after securing these Debentures as a first and prior lien. The Plan of the management removes this safeguard and permits the future mortgage or pledge of the Company's properties without reserving for the proposed new debentures a prior first mortgage position.

(2) Loss of Income from Debentures.—The Debentures now require a fixed payment at the rate of 6½% per annum. The Plan removes this requirement and makes the payment of your interest contingent upon earnings. For the first three years, only 40% of these earnings are made available for the interest on the new debentures. For three years past, there have been no earnings. If you had held a debenture such as the Plan proposes to give you, instead of the one you now hold, you would not have received a dollar of income from your investment for three years past.

(3) Reduction of Coupon Rate.—Not only are you asked under the Plan of the management to make your Debenture interest contingent upon earnings, but, should there be earnings, you are then asked to accept 5% interest instead of [fol. 571] 6½%. Thus, not only are you asked to make sacrifices during lean periods, but even assuming the Company should enjoy prosperous years, your income from the new debentures would remain limited to 5%.

(4) Elimination of Sinking Fund.—Under the present Indenture the Debentures have the benefit of a generous sinking fund under the operation of which all but $537,000 of the outstanding Debentures would have been paid off before their fixed maturity. Under the Plan of the mangement, the sinking fund is eliminated. No matter how substantial the earnings in excess of 5% might be, there is no requirement that the new debentures be paid off before maturity. Under the Plan, on March 1, 1946, there would

be outstanding $5,500,000 of the new debentures. Under the present Indenture, only $1,531,000 of Debentures would be outstanding on that date. In the meantime, $9,185,000 of your Debentures would have been retired at a premium, under the existing Indenture.

(5) Reduction in Principal Amount.—Not only are you asked to give up your first mortgage position and your fixed income and the benefits of the sinking fund, and to reduce the coupon rate, but even that reduced interest rate is again cut in half by the reduction of your principal debt by 50%. You are asked to take a $500 bond for every $1,000 bond now held by you. Even if the 5% were payable as a fixed charge instead of out of income, the 5% on $500 would [fol. 572] only be equal to 2½% on the $1,000 Debenture now held by you. You would therefore be consenting to a reduction of coupon from 6½% to 2½%—payable only if earned.

(6) Loss of February 1, 1931, Coupon.—No provision has been made under the Plan for the interest which matured February 1, 1931. This represents a loss of a half year's interest on all outstanding Debentures.

(7) No Correction in Management.—The Plan completely fails to deal with the most vital question of management. The majority of the present Board of Directors were on the Board of Directors when these Debentures were sold to you in August, 1927. Practically ever since that time, the management of this Company has been unable to produce any earnings. The Plan itself shows a consistent and continuous record of substantial loss, in comparison with consistent substantial earnings of the constituent companies which were merged, for three years prior to the merger. During the last three years, competitor companies, under better management, have earned substantial profits. Adverse industrial conditions therefore afford no proper alibi to the management of this Company for their consistent record of failure, year after year. Do you wish to perpetuate such a management? That is what the Plan will do. Are you willing to sacrifice 50% of your principal and 4½% out of your 6½% coupon, so that such management may have a larger fund, free from any lien in your [fol. 573] favor, to mismanage and fritter away? Assets

have dwindled from $19,374,000, exclusive of good will, as of December, 1926, to $12,800,000, exclusive of good will, in December, 1930, a loss of $6,574,000. Are you willing to permit the balance of these assets to be mismanaged down to a zero?

We believe that the foregoing presents sound and sufficient reasons why you should not deposit your Debentures under the Plan sponsored by the present management, which proposes no remedy for its incompetence.

This Committee realizes that criticism alone will not remedy the conditions complained of. It does not intend to limit its activities to criticism. It intends to present a definite, constructive program to the Debenture holders, after a careful survey, study and analysis of the condition of the Company and the conditions which have brought about the present sad plight of these Debentures. In line with that intention, this Committee has retained the eminent engineering firm of Coverdale & Colpitts and the well known accounting firm of Barrow, Wade, Guthrie & Co. to aid it in arriving at well grounded conclusions as to the course best designed to conserve the interests of the Debenture holders.

To accomplish these purposes in the interests of the Debenture holders, this Committee needs your immediate support. Passive acquiescence in the above views is neither fair to the many Debenture holders who have already deposited their bonds nor will it result in the most effective [fol. 574] representation of your interests by us. This Committee represents only Debenture holders. It does not represent any other security holders. Its sole objective is the preservation of your interests. It is entitled to your immediate full and unqualified support. That support will best be evidenced by refusing to deposit your Debentures under the Plan of the management and by promptly forwarding them to any of the depositaries above named. A letter of transmittal is enclosed for your convenience.

Act promptly in your own good.

Charles C. Hood, Chairman, Charles C. Hood & Company, New York; Bernhard A. Bernstorf, Frank B. Cahn, Frank B. Cahn & Company, Members New York Stock Exchange; Henry F. Whitney, Vice-President Empire Trust Company, New York, Committee.

In United States District Court

Objections to Receivers' Report of Sale and to Confirmation Thereof—Filed Aug. 17, 1932

And now, to wit, this 18th day of August, 1932, come the First National Bank of Cincinnati, Ohio, by Ehrich, Royall, [fol. 575] Wheeler & Walter and Baker & Watts, their Counsel, and International Heater Company, of Utica, New York, by Miller & Hubbell and Alter, Wright & Barron, their Counsel, Interveners, and file the following objections to the report or return of sale filed by the Receivers herein, and submit the same as their reasons why the Court should refuse to confirm the sale set forth in said report, n:

One. The sale was merely a formal and perfunctory step, carried out in accordance with the final decree of sale dated May 31, 1932, and as contemplated by such decree, and was designed for the mere purpose of effectuating a transfer to the complainants of the assets of the defendant. These respondents hereby reassert all of their exceptions and assignments of error heretofore filed herein to the chief decree, viz.: the final decree of sale dated May 31, 1932, and hereby incorporated all of such exceptions and assignments of error as though herein again fully set forth.

Two. The price bid at said sale by the Reorganization Committee is grossly inadequate.

Three. The sale was conducted without appraisal and without other adequate or suitable steps properly to inform the court as to the fair and just value of the assets of the defendant corporation or as to the best manner of realizing on the same for the benefit of creditors.

Four. The said sale was conducted without competitive bidding.

[fol. 576] Five. The decree of sale was so designed as to exclude rather than to bring about competitive bidding.

Six. The place and time of sale were designed so as to prevent bids by parties other than the Reorganization Committee.

Seven. The advertisements of the notice of said sale were merely technical and not designed to bring bidders to the sale.

Eight. The Receivers made no effort, such as the proper performance of their duty required, to promote the sale in such a way as to bring about competitive bids.

Nine. The said sale included therein property described in the said bill as Parcel "G", consisting of the warehouse of the National Radiator Corporation in the City of Cincinnati, County of Hamilton, State of Ohio, which said property by the laws of the State of Ohio can be validly sold at judicial sale only after a preliminary appraisal. (See Code of the State of Ohio, Sections 11672-5—Throckmorton's Annotated Code of Ohio, 1930.)

Ten. The said sale included therein property described in the sale bill as Parcel "E" consisting of plants, foundries, shops and warehouse of the National Radiator Corporation in the City of Chicago, County of Cook, State of Illinois, as well as another property situate in said City, County and State, known as Edgewood Apartment Hotel, and no provision is made by the terms of said sale for preserving and protecting on behalf of creditors of National [fol. 577] Radiator Corporation the equity or redemption in said Chicago properties provided for by the Statutes of the State of Illinois.

Eleven. The sale reported as aforesaid by the Receivers is invalid and illegal because held at New Castle, Pennsylvania, but includes real estate situate in various states and Federal Districts other than in Lawrence County in the Western District of Pennsylvania.

Twelve. The said Receiver's Report of Sale is inaccurate and not comprehensive in that it fails to set forth that the bidders mentioned by name in the seventh paragraph thereof did at said sale by their authorized Attorney in Fact, V. C. Baldwin, decline to bid at said sale after and because Counsel for these objecting respondents had requested the Receivers to adjourn said sale until after the disposition of the appeal from the Decree of sale taken by these objecting respondents to the Circuit Court of Appeals.

Thirteen. The matter of confirmation of the sale should be postponed and held in abeyance, pending the decision by the Circuit Court of Appeals for the Third Circuit of the appeal which has been taken herein by the undersigned in-

terveners from the final decree of sale herein, dated May 31, 1932.

First National Bank of Cincinnati, Ohio, by Baker & Watts, Ehrich, Royall, Wheeler & Walter, Their Counsel. Sidney J. Watts, of Counsel. Interna-
[fol. 578] tional Heater Company, by Miller & Hubbell, Alter, Wright & Barron, Their Counsel. Gifford K. Wright, of Counsel.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL OBJECTION TO PLAN OF REORGANIZATION—Filed Aug. 19, 1932

And now, to wit, August 19, 1932, come the First National Bank of Cincinnati, Ohio, by Ehrich, Royall, Wheeler & Walter and Baker & Watts, their Counsel, and the International Heater Company, by Miller & Hubbell and Alter, Wright & Barron, their Counsel, and supplement their answer heretofore filed to the petition for approval of the plan of reorganization as follows:

Six. The plan is discriminatory, in that it contemplates and makes provision for the payment of some unpreferred and unsecured general creditors in cash in full, while contemplating and providing that others of such unpreferred and unsecured general creditors shall receive a dividend in cash, constituting but a small percentage of the face of their [fol. 579] claims, or be relegated merely to the acceptance of the securities offered by the committee.

First National Bank of Cincinnati, Ohio, by Baker & Watts, Ehrich, Royall, Wheeler & Walter, Their Counsel. Sidney J. Watts, of Counsel. International Heater Company, by Miller & Hubbell, Alter, Wright & Barron, Their Counsel. Gifford K. Wright, of Counsel.

IN UNITED STATES DISTRICT COURT

Statement of Evidence—Filed Sept. 8, 1932

And now, to-wit, Thursday, August 18, 1932, at 11:30 o'clock A. M., the above entitled matter came on for hear-

ing, on reorganization plan and confirmation of sale, before Hon. Robert M. Gibson, Judge, at Pittsburgh, Pennsylvania.

Counsel present:

Maynard Teall, Esq., Reed, Smith, Shaw & McClay, Lawrence Bennett, Esq., and Milbank, Tweed, Hope & Webb, representing the Complainants.

Maynard Teall, Esq., Reed, Smith, Shaw & McClay and Milbank, Tweed, Hope & Webb, representing G. Franklin Ludington and Carl E. Resley, purchasers of the sale.

[fol. 580] Maynard Teall, Esq., Reed, Smith, Shaw & McClay, representing the Receivers.

Baker & Watts (by Sidney J. Watts, Esq.), Ralph Royal, Esq., James F. Hubbell, Esq., and G. K. Wright, Esq., representing the First National Bank of Cincinnati and International Heater Company of Utica, New York.

Louis Caplain, Esq., and David M. Palley, Esq., representing Josephine Ramsey, Edward J. Ramsey and Amy Arzt.

Harriet Cole Thomas, official reporter, by Harriet Cole Thomas, Elizabeth Bunting.

COLLOQUY

Mr. Teall: This is a hearing on the reorganization plan and confirmation of sale which was held pursuant to decree on the 8th day of August at New Castle.

The property was bid in as a whole, as one parcel, by Messers. Ludington and Resley, who stated that they were bidding for the Reorganization Committee under the plan and agreement of reorganization that is on file in the case. The price at which the property was bid was $2,550,000.00, which is $50,000.00 in excess of the up-set price. The receivers have filed a report of the sale which sets forth all the details, but a summary of it is simply to say that the property was bid in on behalf of the Reorganization Committee at $2,550,000.00 and the sale held in all respects as directed by the decree.

[fol. 581] The purchasers, Ludington and Resley, have on file a petition praying for the confirmation of the sale. There is also on file a petition by National Radiator Corpo-

ration, a new corporation, organized under the laws of the State of Maryland, stating that it has taken over the bid of Messrs. Ludington and Resley and requesting that the deed for the property be made direct to it, and also asking confirmation of the sale.

Pursuant to the decree, a petition was filed on behalf of the Reorganization Committee requesting that the reorganization plan be considered by the Court and adjudicated to be fair and equitable.

We are here this morning at the time fixed in the decree, at the place fixed in the decree, of which time and place everybody has had notice, for a hearing on the confirmation of the sale and on the fairness of the plan of reorganization, and at this time under the petitions that have been filed we ask that the sale be confirmed.

Mr. Watts: If the Court please, on behalf of the First National Bank of Cincinnati, Ohio and the International Heater Company of Utica, New York, both parties who have been permitted to intervene in this suit by orders of Court, I present first a paper entitled "Objections to Receivers' Report of Sale and to Confirmation thereof", and another paper in the nature of an answer to the petition of the complainants in this suit praying an order of the Court declaring the plan of reorganization fair and equitable, and ask that these papers be marked filed with the court.

[fol. 582] Mr. Palley: If your Honor please, I appear at this time first on behalf of the preferred stockholder Edward J. Ramsey, who objects to the confirmation of the sale and to the proposed plan and who also objects to the jurisdiction of this court, and who by the submission of these objections does not waive his objections to this court's jurisdiction but specifically reserves them. Mr. Ramsey is the owner of five hundred shares of preferred stock. I appear on behalf of Amy Arzt, a holder of $71,000.00, principal amount of debentures, who appears and files specifications of objections to the confirmation of the sale and to the proposed plan, and who specifically declares and recites in such specifications that this court has no jurisdiction in the matter, and she specifically reserves the objections to this court's lack of jurisdiction. I also appear in behalf of Josephine Ramsey, the owner of $50,000.00, principal amount, of bonds of the National Radiator Corporation,

who also submits and files specifications of objections to the confirmation of the sale and to the approval of the reorganization plan upon the same grounds as that set forth in the specifications of Amy Arzt, reserving specifically the objection to this Court's exercise of jurisdiction. I ask that the Court permit me to file those.

Mr. Watts: Now, as a part of the purely formal matters here, I make application to your Honor for an extension of thirty days of the return day of citation granted by this Court upon our joint appeal from the decree of sale of May 31st.

[fol. 583] Mr. Teall: The only objection I have to it is I don't know when it means the case will be argued. If the return day remains as it is, the case would be on for argument in the October Term, and it is obviously for the best interests of all parties concerned that the case should be disposed of at the earliest possible date. I don't know what the reason for the application is.

Mr. Watts: We desire to cooperate to the fullest extent in securing the prompt disposal of this appeal, but we were somewhat concerned in respect to the possible necessity of a second appeal from the order of confirmation and felt that if there is a record to be printed, it should be a record that would be applicable to such a second appeal, and that if the matter is to be put before the District Court of Appeals, it should be argued at one time only and not successively.

(Discussion between counsel on the granting of extension.)

The Court: I will reserve that ruling until we get further information.

Mr. Teall: I think the Receivers' report of sale and petition for confirmation to which I have referred presents the situation for confirmation and if there are objections to the confirmation, I suppose that the time is ripe for the objectors to go ahead.

[fol. 584] Mr. Royal: We want to make it quite clear that we reassert and urge again everything which we urged before your Honor in respect to the making of the main decree, and we wish to refer your Honor to the written exceptions and assignments of error which we have filed herein to that decree and to reassert each and every one of them. It would

seem it was unnecessary to make any argument here as the matter of confirmation would seem in effect to be predetermined by the decree, unless the Court feels that this is an occasion where the Court would wish to reopen and reconsider the Court's previous determination, but in that case, your Honor, we must frankly submit that we have nothing substantially to add here by way of argument upon the propriety of the main decree beyond the things which were submitted to your Honor previously.

The Court: Do I understand your exceptions relate back to the decree of sale rather than to any imperfection or impropriety in the sale itself?

Mr. Royal: Broadly speaking, that is precisely our position. We wish it on the record we are opposing these further steps, and out of super-caution, to prevent any possible indication we have surrendered any of our positions, we intend to appeal from these purely formal and perfunctory decrees which we assume will follow as the result of this hearing.

(Discussion off the record.)

[fol. 585] The Court: Let the record show that no testimony has been offered on behalf of either of the contending parties in relation to the methods of sale.

Mr. Watts: Ought we not to have a stipulation of record that the contents of the Receivers' return or report of sale be considered as before the Court as far as their evidentiary value is concerned?

The Court: They are filed and part of the record in this case and, of course, they are to be considered.

Mr. Watts: On the other hand, in our exceptions we make reference in two places—one to the law in the State of Ohio and the other to the law in the State of Illinois, and I think it might be agreed that the Court either knows or will take judicial notice of the law of those two states.

Mr. Teall: I understand the law of a foreign state has to be proven as a fact. The law of this state is judicially known to the Court.

Mr. Royal: If that objection is to be pressed, I ask leave of your Honor to file by way of photostatic copies from the Official Reports the statutes that we have as sufficient evidence.

The Court: We will allow you to submit the copies of the statutes, or reference to the book will be sufficient, and con- [fol. 586] sider it as in evidence here so that there may be no question about that phase of it.

Mr. Teall: We object to the competency or relevancy or materiality of any state statute, this being altogether a matter controlled by the Federal Statutes since the sale is pursuant to a decree of the Federal Court.

The Court: We will allow the statutes to be offered and overrule the exception for the time being and pass upon it later.

Mr. Hubbell: May I say a word as to the position of the International Heater Company? The International Heater Company owns none of these debentures and, therefore, the Bankers' Trust Company does not represent us in any way. We hold some promissory notes which were given for a third interest in a company, and the assets of that company consisted largely of merchandise. Under this proposed plan all merchandise creditors were to be paid in full. What we turned over was substantially merchandise; so I was in some doubt as to whether we were merchandise creditors or were not, and being in doubt I went to Mr. Teall and he tells me that the International Heater Company is not to be paid, and there is nothing to that effect in the record. If it could appear in the record in some way that that is so, why then, so far as I know, we are the only general creditor that is left out and not paid in full. We are simply told to take some of these debentures at fifty cents on a dollar, which we don't want at any price. We [fol. 587] would take our fair percentage in bankruptcy or any other method of administering the assets under the statutes, but we don't want any of these debentures, and I would like to have the opportunity to have it appear on the record what Mr. Teall says is the fact, that we are not to be paid; that we are simply given an opportunity to take some of these debentures, and then I would like to file an objection to that, and if the Court would like to hear testimony as to the general fairness of the plan, why then I would like to produce testimony that such a plan of paying all the creditors except one is not a fair plan, and point out many other inequities in this plan. Your Honor will appreciate this is the first opportunity I have had to appear in the court or in the proceeding in any way except to file a formal notice of intervention. When the hearing was

held before I didn't know anything about it until it was all over and neither did the International Heater Company, of course, so that the proceedings were all taken and then we are given an opportunity to take something we don't want and not much opportunity so far to do anything else.

Mr. Teall: In the first place, I am surprised to hear Mr. Hubbell say that the indebtedness owing to International Heater Company was for merchandise, because it is my understanding that these notes were given for stock in a certain corporation.

Mr. Hubbell: I so stated to the Court.

[fol. 588] Mr. Teall: Then I don't see how that can be for merchandise.

The Court: Let us not argue that matter on the record. State your position simply in regard to this.

Mr. Teall: Those obligations held by the International Heater Company are promissory notes given for the consideration just stated and they are of the same class of indebtedness as the debentures. The reorganization plan permits the International Heater Company to come in on exactly the same basis as the debenture holder, and the consideration for these notes as I understand the matter, and as I understand Mr. Hubbell to agree, is the stock in a certain corporation. It is true, as Mr. Hubbell states, that the reorganization plan does not propose to pay Mr. Hubbell's client one hundred cents on the dollar on his notes, any more than it proposes to pay the debenture holders, but it does place his client exactly on the same basis as the debenture holder. Am I right in that statement?

Mr. Hubbell: Yes, you are right in that statement. Will you tell me this additional fact; is there any other creditor outside the debenture holder that is not to be paid in full?

Mr. Teall: Yes. There are a number of people with claims for rent on leases that may not be paid at all. It is [fol. 589] a serious question that this Court may ultimately have to determine whether those people can get anything or not. As to the merchandise creditors, relative small amounts, averaging only approximately $150,000.00, the reorganization plan proposes the Reorganization Committee or the new corporation or somebody will pay them, but there is only about $150,000.00 of those altogether.

Mr. Hubbell: If Your Honor please, the facts being as Mr. Teall has stated them and if they propose to go into the fairness of the plan and have Your Honor adjudicate

this is a fair plan, then I would like an opportunity to file an objection to that, and if Your Honor desires to try it out, then I would like an opportunity to produce witnesses and introduce considerable proof as to whether it is a fair plan or not, thus to treat one creditor.

Mr. Teall: May I make a correction? I stated these merchandise creditors that were to be paid in full were approximately $150,000.00. Mr. Bennett states that is wrong; that the merchandise creditors to be paid in full under the reorganization plan are only about $50,000.00, instead of $150,000.00.

Mr. Hubbell: I don't desire, of course, to cause any unnecessary delay because I am eager to have it disposed of, but it wouldn't delay anybody to give me three or four days to file this objection, and as to whether further testimony is taken, I am willing to acquiesce in the decision of the Court.

[fol. 590] The Court: I take it you have had notice of this proposed hearing for some considerable time?

Mr. Hubbell: Yes, we have but I didn't want to bring a lot of witnesses here without knowing what would be heard or gone into. I haven't any desire to attack the formalities of the sale except the objections that are set forth, the objections which are largely a matter of law, but if it is the intention of Your Honor to pass upon this plan and say it is a very fair and equitable plan, I think we ought to have a hearing on it.

The Court: This was the day fixed for that and if you had notice, the opportunity was given to be here today for that purpose. I will allow you to file any formal objection that you may want in the future as of today and introduce any testimony you may desire in connection with it at this time, but I do not see any particular advantage to anybody in continuing the matter.

(Recess taken until 1:30 P. M.)

1:30 P. M.

Afternoon Session

(Discussion by counsel on extension of time for appeal.)

The Court: I will give you until the 15th of September.

[fol. 591] Mr. Teall: If the Court please, I am in a little

quandary about how to proceed. This morning I went on the assumption that the first matter to be taken up was any objection to the confirmation of the sale and then the question of any objections to the reorganization plan. I think when we get to the latter that probably I should outline it briefly. Is it Your Honor's wish the confirmation of the sale point be disposed of first?

The Court: That is what I suggested this morning, and I think the record should show whether or not the various counsel propose to offer any testimony in connection with the question of the sale.

Mr. Palley: On behalf of the three parties I represent the position we take is this Court has not the jurisdiction, and our reason for coming into this Court is because this Court through the representation of a corporation forces us to come in here and protest to the exercise of jurisdiction.

The Court: First of all, do you propose to offer any testimony at this time in regard to objections to the confirmation of sale?

Mr. Palley: I do. I offer in evidence a notice sent by the National Radiator Corporation, dated February 2, 1931, which reads as follows:

"National Radiator Corporation, Johnstown, Pa.

To the holders of National Radiator Corporation 6½% sinking-fund gold debentures:

[fol. 592] National Radiator Corporation will omit payment of the coupon due February 1, 1931, on its 6½% Sinking Fund Gold Debentures. This action was deemed advisable to conserve its cash resources. The management has requested a Committee consisting of Messrs. Rudolph B. Flershem, Charles O. Cornell and John H. Waters to formulate a plan of Reorganization. The Committee expects to be able to announce a plan shortly.

National Radiator Corporation. John H. Waters, President."

I offer in evidence the petition of the Reorganization Committee for the approval of the reorganization plan which is on file in this court, and to which are attached

other documents except the one I have just offered in evidence.

(Notice marked Ramsey & Arzt Exhibit [illegible])

Mr. Palley: Mr. Teall, will you concede this notice, Exhibit No. 1 of Ramsey & Arzt was sent to all bond holders of the National Radiator Corporation on or about February 2, 1931?

Mr. Teall: I will stipulate that was sent to all debenture holders whose names and addresses were then known to the company.

Mr. Palley: This, together with the facts which appear in the petition for the approval of the plan, shows that this [fol. 593] Court did not acquire jurisdiction of the cause out of which this litigation proceeds and out of which the sale proceeds because it violates Section 7 of the United States Judicial Code.

The Court: You have introduced all the testimony you desire in connection with the sale feature?

Mr. Palley: Yes. I also protest against the sale on this ground.

The Court: You have already protested formally and we will allow you to protest at length verbally when the time comes but the time is not yet.

Mr. Palley: There is one ground I have not stated and that is in so far as the order of sale directed the sale of the cash on hand at the direction of the Receivers, the order is improper.

The Court: If you want to add that to your exceptions, you may do so.

Mr. Palley: I do so add it.

The Court: Is there any other testimony in connection with the sale feature?

Mr. Royal: I thought we had indicated to Your Honor we have no testimony. I wish an opportunity to make a [fol. 594] motion to the Court before we leave the subject, but as far as testimony goes not on the subject of the confirmation.

The Court: There being no further testimony in regard to the sale feature, does counsel for the complainants desire to offer any testimony in respect to it?

Testimony of David M. Palley

David M. Palley, a witness called on behalf of the complainants, having been duly sworn, testified as follows:

Direct examination.

Mr. Teall:

Q. Mr. Palley, do you have any personal ownership interest in any of the bonds that your petition-s filed this morning?

A. I have not.

Q. Do you know when Mrs. Arzt became the owner of the seventy-one bonds which her petition states she owns?

A. Miss Arzt was assigned those bonds for the purpose of consolidating various claims of people interested in those bonds very recently.

Q. How recently?

A. Well, within the last, probably, week or two.

Q. Has anybody else ever brought a suit against the National Radiator Company on those same bonds, or any of them?

A. On some of them, yes.

Q. Who?

[fol. 595] A. Miss Berger.

Q. Whereabouts?

A. In New York State.

Q. Who was Miss Berger?

A. Miss Berger was an employee in our office.

Q. Is Miss Arzt an employee in your office?

A. She is.

Q. State whether or not, if you know, whether the eleven bonds stated in the Clapier suit to be owned by Mrs. Clapier are included in the seventy-one bonds stated in today's petition as belonging to Miss Arzt.

A. They are not.

Q. I understood you to say that Miss Arzt's bonds were lately assigned to her for the purpose of consolidating the claims of various bondholders to be asserted in this cause.

A. They are numerous bond holders whom I have represented who have bonds, and instead of filing separate petitions in behalf of them all it was agreed we have them

assigned to Miss Arzt and have her sign the specifications in behalf of all of them.

Q. Will you give us the names of those various bondholders and the bonds held by each?

A. I can't do it because they come from one source. I know the number of bonds but who the individuals are I don't know.

Q. What source do they come from?

A. The Bondholders' Protective Committee.

Q. Who are the Bondholders' Protective Committee?

A. Mr. A. R. Perpall is one of the officers.

[fol. 596] Q. Who are the other members?

A. I don't know.

Q. So far as your knowledge goes, you have no knowledge as to who are the beneficial owners of these seventy-one bonds stated to be owned by Miss Arzt?

A. I do not, except I know they are from the Bondholders' Protective Committee.

Q. This Bondholders' Protective Committee to whom you refer was formed subsequent to the Reorganization Committee under the plan of reorganization?

A. Not as I understand. I didn't organize it but that corporation has been in existence a number of years.

Q. It is a corporation?

A. Yes, it is a corporation.

Q. What is the corporate name?

A. I think "Bondholders' Protective Committee, Inc."

Q. Was the name "Bondholders' Syndicate of America"?

A. Yes, I think that is it.

Q. Are you an officer or director of that corporation?

A. I am not.

Mr. Teall: That is all the testimony for the complainants.

COLLOQUY

Mr. Watts: Your Honor will recall this morning I made some reference to the effect of the sale and our exceptions [fol. 597] thereto. Perhaps it should appear here as admitted of record that the part of our exceptions which relates to the refusal to bid by the attorney in fact for the bidders listed in full in paragraph 7 of the return of sale

correctly sets forth what actually transpired at the sale; said exception being No. 12.

Mr. Teall: At the request of Mr. Watts I am willing the record shall show that I was present at the sale on August 8th and that one Vincent C. Baldwin, whom I believe to be an attorney at law of Chicago, Illinois, appearing to represent three different bidders who had qualified for different parcels, not including Parcel "A", not including Parcel "K", made the statement early in the proceedings at the sale that his clients would not be bidders and that he stated as his reason that there was an appeal pending from the final decree of the sale entered by this Court on May 31, 1932.

Mr. Watts: Is it not a fact, Mr. Teall, he also referred to my request for an adjournment?

Mr. Teall: I didn't hear him.

Mr. Watts: And is it not also a fact that Mr. Heiner requested him to produce his written powers of attorney?

Mr. Teall: I am not on the witness stand.

[fol. 598] Mr. Watts: Won't you admit that Mr. Heiner asked him to produce his written powers of attorney?

Mr. Teall: Yes, he produced his written powers of attorney and filed them with the Receivers, which written powers of attorney authorized him to bid.

Mr. Watts: On behalf of the principals?

Mr. Teall: Yes.

Mr. Watts: We desire also that it appear of record that there were no other bids submitted at the sale than those made by Mr. Resley and Mr. Ludington on behalf of the Reorganization Committee.

Mr. Teall: That is correct. Complainants have no testimony in answer to what has just been offered by Mr. Watts.

Mr. Caplan: I want it to appear of record, if your Honor please, the amount of cash and Government bonds that the Receivers had on hand on the day of sale and which were offered for sale as part of the assets of this company. I understand from Mr. Heiner that on July 31, 1932, which was eight days before the sale, the Receivers had on hand cash of $504,469.53, Certificates of Deposit in several banks amounting to $50,000.00, and United States Government [fol. 599] bonds of $980,000.00 par value, on which the accrued interest was $17,156.25, making the total of cash and

securities $1,551,615.78, and that the figures with respect to these items were approximately the same—perhaps $5,000.00 less—on the date of the sale, August 8, 1932.

The Court: Is there a stipulation to that effect on the record now?

Mr. Teall: We agreed to that.

Mr. Palley: May I at this time offer in evidence the summary statement which was contained in the report of the receivers which was filed, I believe, on January 2, 1932, which sets forth a summary of the assets and liabilities of the company as of October 8, 1931. I understand such a report is on file in the Clerk's office.

Mr. Teall: I suppose it is not necessary to offer it in evidence as it is a part of the evidence in the case.

The Court: If you desire, it may be offered in evidence.

Mr. Royal: Before we leave the sale, your Honor, I wish to make this formal request upon the record that any order to be made herein confirming the sale should contain a provision postponing the transfer of title to the Committee or [fol. 600] the new corporation pending the hearing and decision on the appeal which has been taken by the intervenor for whom I speak from the final decree of sale made May 31, 1932.

Mr. Teall: If the Court please, we of course oppose such a motion. The Statutes and Rules of Court prescribe exactly how he can stay this matter and that is by filing a supersedeas bond, and to make these creditors run the risk of substantial loss by the delay here without the filing of any bond to protect anybody I think would be most unusual.

The Court: The motion will be considered when we consider all the other matters of the case.

Mr. Teall: If your Honor please, I have a witness here by whom I should expect to show, if your Honor wants to hear him, that the cost of this delay to the estate would be approximately $50,000.00 a month, and if that motion is being pressed and is to be considered at some time during the proceeding, I would like to offer evidence on that.

The Court: We will allow you to call your witness.

[fol. 601] TESTIMONY OF BARRETT B. RUSSELL

BARRETT B. RUSSELL, a witness called on behalf of the complainants, having been duly sworn, testified as follows:

Direct examination.

Mr. Teall:

Q. Where do you reside, Mr. Russell?

A. Johnstown.

Q. What is your occupation?

A. Industrial engineer.

Q. You also are informed on matters of accounting?

A. Yes, sir.

Q. What is your present employment?

A. Statistician and industrial engineer with the National Radiator.

Q. That is to say, you were in the employ of the company and you now are in the employ of the Receivers?

A. Yes.

Q. State whether or not you have worked out from the books of the company and your knowledge of its affairs the possible loss that might accrue through the continuance of the present receivership.

A. I have.

Q. How did you go about that?

A. I estimated the sales with the best information we have and then proceeded to figure how much it would cost to get those sales into the company in the way of cash discount and bad debts, took the accounts receivable, added to [fol. 602] those figures the net return on the sales, figured the collection percentage; then added to that the cash on hand and the marketable securities; then took the inventories as they would probably be from time to time at the present production rate and figured what the decrease in current assets would amount to at that rate through the year. I figured approximately eleven months at this rate.

Q. Do you have a tabulation of that?

A. I have.

(Paper marked Complainants' Exhibit No. 1.)

Q. Mr. Russell, I show you a paper marked Complainants' Exhibit No. 1, and ask you whether that is the tabulation that you have prepared.

A. That is the tabulation I prepared.

Q. You have based that, as I understood you a moment ago, on current production and current experience generally? Is that correct?

A. Yes, that is the current condition.

Mr. Teall: We offer Exhibit 1 in evidence.

Mr. Royal: I object to it, your Honor. It is a most unusual method of procedure. I could understand an expert being called and having it contended he was familiar with the operations of the receivership, and asked to analyze the actual operations, show what they have been, and then indulged, if you please, upon speculation that the past operations were a fair indication of what the ensuing months might produce, but there is nothing of actualities in here as I see it. It is a pure speculation, based upon it does not [fol. 603] appear what, of what it ought to be without any reference to what the actualities of operation have been. Why can't we come at this in a more direct and sensible way? Let us find out what the receivership has made or lost and then we will know something.

Mr. Teall: It is just an effort, if the Court please, to estimate what the expense of delay would be.

The Court: We will admit it for what it is worth and note an exception.

Mr. Royal: I object to it. It is incompetent, irrelevant and immaterial and on the grounds it is purely a speculation.

The Court: That objection is overruled and exception noted, and we will later pass upon its effect.

Mr. Hubbell: I don't know whether the other parties have the benefit of that exception, but I would like to object to its reception in evidence for the International Heater Company unless there is also made a proposed computation of what they are not going to lose under the action of the Receivers.

The Court: I understood Mr. Royal was representing all these interests and I think it was placed upon record, so you have the benefit of that exception.

[fol. 604] Mr. Royal: I want to correct that statement, if your Honor please. I represent merely the First National Bank of Cincinnati and no one else. Because of the Judiciary Code Provision in taking the appeal any parties to the record are similarly situated and must appear jointly. In this way is the International Heater Company with us. To comply with that rule we have joined in the appeal, but my retainer and my representation is for the First National Bank of Cincinnati and no one else.

The Court: If there is any question, let the other objection be received under the same terms and same ruling.

Cross-examination.

Mr. Royal:

Q. Have you made any examination of the actual result of the operation of the receivership during recent months?

A. I see the statements from month to month, yes.

Q. Are the operations of the receivership in the black or in the red?

A. They are at a loss.

Q. Are the actualities of the loss consistent, so far as average rate goes—consistent with this average rate you have tried to speculate about in this exhibit, Complainants' No. 1?

A. I couldn't say. I haven't compared them.

[fol. 605] Q. You haven't attempted to check the soundness of your speculation by comparison with the actualities of the operation?

A. No.

Q. You have just speculated without attempt at verification by comparison with the actual experience which the receivers have had and which are accessible to you in their books?

A. The experience of one month does not check with another month in this business. It is not a consistent matter.

A. I didn't say it was, but I suppose there would be such a thing of averages, wouldn't there? The receivership has been operating how many months?

A. I couldn't say.

Q. I thought you testified you are employed by the receivers as an accountant upon their books?

A. I was employed by the National Radiator before that.

Q. And since then you have been employed by the receivers?

A. Yes.

Q. Don't you know how long you have been acting for the receivers on their books?

A. I couldn't say.

Q. Will you give the Court any impression how long you have been working on the books of the receivers?

A. I haven't worked on the books. I have had the use of them in other examinations.

Q. Can you give the Court any impression for how long a period you have been acting for the receivers in whatever [fol. 606] capacity you have been acting for the receivers?

A. About ten months I would say.

Q. Do you think you have been acting for the whole period of the receivership?

A. Yes, I have.

Q. It is just a question you don't know how long the receivership has been then?

A. Yes, exactly.

Q. Let us refresh you on that then. I believe the date of the receivership counsel for the Committee say was October, 1931, and now you say you have been employed for the receivers continuously from October, 1931, to date. Is that it?

A. Yes, sir.

Q. Now, then, there is such a thing, isn't there, of computing the monthly averages of the receivers' operation—the profit and loss side of it—for the period from October to date?

A. Yes, sir.

Q. You made no attempt to do that?

A. I have compared with other figures but not with these.

Q. Are you in a position, since you are guessing, to guess whether or not your purely speculative computation as to the future shows a greater or less rate of loss than would be indicated by a computation of the average of the actual experience of the receivership?

A. My impression would be it would be a less loss.

Q. You think you have indicated a less loss than the actual loss?

[fol. 607] A. Yes, up to the present.

Q. I don't understand you. Perhaps you mean just the opposite from what I think you mean. State carefully what your impression would be as to a comparison of the actualities with these speculations of yours.

A. My belief is that the future loss will be less than the loss in the past, due to increased sales.

Q. Well, then, do you think this receivership in the past has been losing money at the average rate of more than $50,000.00 a month?

A. I couldn't say offhand. I would have to look at the records.

Q. You have indicated here as speculation the future loss of $50,000.00?

A. Yes.

Q. As I understand you, the indicated future rate is less than the actual rate the receivership has been operated under?

A. Yes.

Q. Now, I ask you have the operations up to date been conducted at an average loss of greater than $50,000.00 a month?

A. My belief is from the first of the receivership to the first of this year it would be less than $50,000.00, and from the first of this year to the present time probably more than $50,000. That is my estimate. It makes a difference what period of the year you are talking about.

Q. I was taking the average. We have had a period of more than a year, which would carry us through all the seasons, and we are talking about the average loss. Your an-
[fol. 608] swer I understood is this: that up to the first of this year the receivership was operated at a rate of something more than $50,000.00 loss?

A. Up to the first of the year less.

Q. How much less?

A. I couldn't say.

Q. You have come here to testify upon this subject. I wish you would give your best knowledge to the Court upon that question.

A. I don't know.

Q. You don't know how much the actualities of the receivership operation have shown as a loss? Is that what you want to say?

A. Yes.

Mr. Royal: Now, I move to strike this exhibit and this witness's direct testimony out. It appears he doesn't know anything about the actualities but nevertheless comes here with a speculation about what the future loss is to be.

Mr. Teall: I understood the witness to say he had based his estimates on current sales and current inventories and all that as actualities. I think possibly he means he hasn't computed what the actual loss has been, but the bases of his computation are actualities, as I understood them.

Redirect examination.

Mr. Teall:

Q. Let us take those figures for sales, Mr. Russell, for these various months. Where did you get those?

[fol. 609] A. Those sales figures are taken from the current rate of sales as shown by an increase since the first of the year.

The Court:

Q. Is that the total amount of actual sales?

A. The standing at the present time; along the same rate we seem to be increasing at the present time since the first of the year.

Q. You are adding to the actual sales a certain percentage of increase? Is that it? Estimated?

A. Yes, sir.

Mr. Teall:

Q. That rate of increase, if I understand you, is the rate of increase which has actually obtained over the past few months?

A. Yes, sir.

Q. Now, this "Less Cash Discount (4.2%)." Where did those figures come from?

A. That is our average cash discount at the present time. What it is costing the company for cash discount, actual figures, four per cent of sales.

Q. What is "Less Reserve for Bad Debts (1%)?"

A. That is the reserve we are making at the present time. One per cent of the sales is the reserve for bad debts.

Q. That is an actuality?

A. Yes, actuality.

Q. And "Net Collectibles." Where did those figures come from?

A. That is the substraction of the two preceding figures [fol. 610] from the figure—cash discount and bad debts substracted from sales, giving you Net Collectibles.

Q. And "Notes & Accounts Receivable Less Reserve." What is that figure?

A. That is starting with the present figure on the books, adding the net collectibles to the present figure and de-

ducting the collections, which comes below that. Just the way it occurs on the books of the company.

Q. To take another one—"Less Expenditures." Where does that expenditure figure come from?

A. That is an estimated figure from the amount of production.

Q. Actual production or expected production?

A. Present rate of production that we are getting at the present time; actual expenditures of operation at the present rate of production.

Q. "Cash on Hand." Where did that figure come from?

A. That is subtraction of the expenditures from the amount of money you had above there—from the collections and cash—what you have left over.

Q. In other words, that is a computation on two actual figures?

A. You have two figures there on that sheet, yes.

Q. "Marketable Securities at Cost." Is that an actuality?

A. That is an actuality.

Q. State whether or not it is true to say that the various elements of this computation are actualities based on [fol. 611] figures as they are at the present time and actual operations of the business. If that is not correct, state wherein it is not correct.

A. That is based on actualities. The only figures which are not actual are estimates of what sales will be. The rest of it is as it will work out from those sales.

Q. That is, the only thing you have actually estimated as distinguished from the actual figures is the probable sales?

A. Probable sales.

Recross-examination.

Mr. Royall:

Q. Will you point out to me any place in this set of figures where there is indicated your amount or rate of loss from operations?

A. The rate of loss isn't there. That is the decrease in amount of assets.

Q. I thought this was put forward as a computation to justify some statement that counsel made that the prospect

was you would lose $50,000.00 a month here if you continued operation. Isn't that what it is all about?

A. You have got it wrong.

Q. Well, what is it that this document is intended to show? What do you think it is intended to show?

A. It is intended to show the decrease in the current assets of the company, which is different from the loss.

Q. You put this forward as a computation of accumulative decrease in current assets that you expect to incur?

[fol. 612] A. Yes, sir.

Q. What do you include as current assets for that purpose?

A. Cash, inventory, your investments, accounts receivable.

Q. You have in here in constructing that an item, "Less Reserve for Bad Bebts (1%)," applicable to your receivables?

A. Yes.

Q. Is that in your opinion a proper figure to take?

A. That is not on receivables. It is on sales.

Q. Well, don't sales translate themselves into receivables?

A. There is a difference.

Q. When you sell goods you create a credit, don't you?

A. Yes.

Q. You create a receivable, don't you?

A. You create a receivable, yes.

Q. So aren't we talking at cross purposes when you take exception to that as a reserve against receivables?

A. I misunderstood you. I thought you meant accounts receivable.

Q. Do you consider one per cent to be a proper reserve against accounts receivable?

A. Not against accounts receivable; against sales.

Q. Any way you want to express it. Against debts. You use the term "Bad Debts."

A. That is a figure that has been used over since I have been with the company.

[fol. 613] Q. I asked you if you consider it a proper figure.

A. I believe so.

Q. You approached this as an expert, didn't you?

A. Yes, sir.

Q. You intended to use elements in here for the purpose of this computation which in your opinion as an expert were proper and correct and correctly taken?

A. Yes, sir.

Q. And as such an expert you do testify then that this one per cent reserve is, in your opinion, the proper percentage to apply?

A. I believe it is the proper percentage to apply at the present time.

Q. Do you know to what extent the receivables of the receivership are precisely that? That is, receivables as distinguished from old receivables as of the date of the receivership. That would be October 1, 1931. Can you give the Court some opinion as to how that breaks itself up?

A. I cannot.

Q. Will you give the Court any opinion whatsoever as to what the extent of the uncollected accounts receivable as of October 1, 1931 was?

A. I can't give you any figures, no. I haven't them with me.

Q. Well, without giving details, do you know enough of the general situation to advise the Court in round percentages how that is broken up?

A. You mean?

Q. To what extent do you think that the old receivables [fol. 614] as distinguished from the receivables created by the receivers themselves, expressed in percentages roughly?

A. I can't give it to you. I never figured it and it wouldn't come to my notice. It wouldn't come to me.

Q. I ask you as to the inventory. What, in round percentages, is the inventory now in the hands of the receivers and inventory created by them as distinguished from the remains of an inventory taken over by them in October, 1931, from the corporation? Are you able in round percentages to indicate to the Court that break-up?

A. Roughly, seventy-five to eighty per cent I would say.

Q. You would say seventy-five or eighty per cent were inventories created or manufactured by the receivers?

A. You say created by the receivers?

Q. I am asking you. You say seventy-five to eighty per cent. What does it apply against?

A. The present inventory as against the inventory when the receivers took charge.

Q. Then you say of the inventory now in the hands of the receivers it is your belief that seventy-five or eighty per cent of it is inventory which they made or manufactured?

A. No, I wouln't say that.

Q. What do you say?

A. It is the current inventory against the inventory when the receivers took charge.

Q. You are just comparing the bulk amount?

[fol. 615] A. Yes.

Q. You are not intending to indicate at all whether there is any part of the present inventory which is the left-over of on hand stuff on October 1, 1931? You don't know that?

A. Actual physical pieces, I suppose thirty per cent.

Q. Thirty per cent is what—old stuff?

A. Maybe, yes.

Q. And seventy per cent is new stuff? Is that what you want to say?

A. I am estimating it at that, yes.

Q. You mean by "old stuff" stuff on hand when the receivers were appointed, and you mean by "new stuff" stuff that the receivers manufactured?

A. I would like to raise that a little. I would say forty per cent rather than thirty per cent.

Q. But you are not able at all to give any estimate of the comparative break-up of the receivables?

A. No.

Q. Have you got any data in court here that would enable you to do that with reasonable speed?

A. I don't know.

Mr. Teall: I don't like to object but I don't see how that is cross examination. If we can stipulate the receivership is doing business at a substantial loss at the present time and has been, that is all I want to get on the record.

Q. Mr. Russell, you describe the business of making and selling of radiators such as this corporation conducts as a seasonal business?

[fol. 616] A. Yes, sir.

Q. And the late months in the summer and early months of the fall is the season of activity in sales. Isn't that so?

A. September, October and November will net you most of your sales.

Q. September is a big month?

A. Pretty good month.

Q. September and October are the two big months?

A. Yes.

Q. The reasonable prospect, therefore, is that during September and October a great part of this inventory now in the hands of the receivers will be realized on? Isn't that so?

A. A considerable lot of it will, yes.

Q. And would you say that considering that and estimating the consequences up to, we will say, the first of November that every prospect is that there will be a large increase in cash and receivables over the present cash and receivables by a continuation of the operation of the receivership up to November?

A. Cash and accounts receivable but less inventory. Current assets decreased.

Q. I am asking you about cash and accounts receivable, and there will be a corresponding decrease in inventory?

A. Yes.

Mr. Palley:

Q. Mr. Russell, will you kindly look at this photostatic copy of a statement and state whether, if you can, this statement correctly reflects the financial condition of the Na- [fol. 617] tional Radiator Corporation for the twelve months ending September 30, 1931, and September 30, 1930?

Mr. Teall: I don't get the propriety of this question at all.

The Court: What is the purpose of it?

Mr. Palley: The purpose is to show the difference between the operation of the company prior to receivership, and during receivership and also to show the condition of the company as of those days, as to the period immediately before the receivership in 1931 and in 1930. They have a bearing upon the entire matter.

The Court: We have that generally in testimony that has been taken here before. Go ahead.

Q. Do you know, Mr. Russell?

A. I have no way of checking these figures. I don't know anything about it.

Q. Did you in or about September 30, 1931, issue an operating statement and assets and liabilities statement?

A. Personally, no.
Q. Did the company?
A. I don't know.
Q. Weren't you in charge of the books of account?
[fol. 618] A. No.

(Statement marked Arzt & Ramsey Exhibit No. 2.)

Mr. Teall:

Q. You don't keep the books and are not in charge of the accounting end?
A. No.

Mr. Teall: Does that close the evidence on the confirmation of sale?

The Court: Unless there is something more offered it does.

(Discussion off the record.)

Mr. Teall: Attached to the answer filed today by the First National Bank of Cincinnati, Ohio, and the International Heater Company is a photostatic copy of a printed circular letter addressed to holders of the National Radiator Corporation debentures and signed by four persons, among them Frank B. Cahn, called a committee. I will concede that the letter just referred to is a true copy of a letter that was sent out by that committee, subject to the proviso that the bonds controlled by this committee subsequently came into the present reorganization plan, withdrawing their objections thereto, and subject to the further proviso that we have no knowledge whether Mr. Cahn, a member of the present committee and a member of the committee [fol. 619] writing this letter, ever saw this letter.

Mr. Royal: You are conceding Mr. Frank B. Cahn, who purports to be one of the promulgators of this letter, is the same Frank B. Cahn of what we may describe as the Flershem Committee?

Mr. Teall: That is conceded.

Mr. Bennett: We do not stipulate he knew about the letter before its going out.

Mr. Royal: I take it for granted Mr. Cahn knew about it, whether you concede it or not. I don't presume these gentlemen are having things go out over their signatures that they don't know about.

Mr. Bennett: That is an improper remark. You don't know anything about it.

Mr. Royal: As to the question of further testimony I suggested this morning that I felt the record should show here the relationship of the management of the promulgators' plan to the corporate stock ownership of the corporation, especially as the plan preserves an interest for the old stockholders. Perhaps a statement could be put on the record by the other side as to what the facts are.

[fol. 620] The Court: In connection with the matters which are before the Court here, do you question the right of the Court to consider the testimony taken at the prior hearing? The reason I ask that is that I think all those matters were brought out in the original testimony.

Mr. Royal: I don't question that at all, your Honor. I suppose we would all assume that that testimony would be considered here and I don't care to be repetitious in the least.

The Court: Doesn't that all appear?

Mr. Royal: Not very adequately. There is enough there to show that the proponents of the plan are interested stockholders, but it does not show any detail about it. I think perhaps it is enough for my arguments that they were, but I would like to have the record show to what extent they were the owners of the preferred stock of the company, and I would like my friends to furnish that information.

Mr. Teall: You don't want us to prove your case for you?

Mr. Royal: I can call witnesses, if you like.

[fol. 621] TESTIMONY OF JOHN H. WATERS

JOHN H. WATERS, a witness called on behalf of the intervenors, having been duly sworn, testified as follows:

Direct examination.

Mr. Royal:

Q. What office in the National Radiator Corporation do you hold?

A. President.

Q. You were an officer and stockholder of a previous corporation also known as National Radiator Corporation, or was that previously known as Company?

A. National Radiator Company.

Q. To what extent do you own or have you owned since the promulgation of this plan at any time owned the preferred stock of the present National Radiator Corporation?

A. Since the present proposed reorganization?

Q. Yes. Say during the period of the last two years.

A. What amount of preferred stock?

Q. Yes.

A. I think I have owned during that period $50,000.00 of the preferred stock.

Q. Now, then, is the preferred stock owned to any extent during that period, or was it, by other members of your family?

A. Some of it, yes.

Q. And to what extent?

[fol. 622] A. I wouldn't be able to tell you that offhand; probably owned jointly half as much as I do.

Q. Is that the amount of stock that the family interests received of preferred stock as part of the consideration of turning over the old National Radiator Company in the merger of 1927, out of which the present defendant came into being?

A. That was accepted in lieu of cash. They could either have had cash or stock.

Q. But the amount of preferred shares that you have referred to represent all of the preferred shares that you or your family received in 1927?

A. So far as I am concerned, it does. I don't know—some of my family may have disposed of part of theirs.

Q. To what extent did you receive them in the first instance? To the extent of the figures you have just given me.

A. I received $50,000.00, yes.

Q. And some other members of your family received an aggregate of somewhat less an amount?

A. Yes.

Q. Will you please describe the amount of your holdings in the common stock of National Radiator Corporation?

A. I have today in the neighborhood of 60,000 shares.

Q. As your family shares other than yours?

A. Yes.

Q. To a large extent?

A. Well, they probably hold jointly, I should say, ten or twelve thousand shares. I am not prepared to say the exact amount.

[fol. 623] Q. Round figures would be satisfactory.

A. Yes.

Mr. Palley:

Q. Mr. Waters, when for the first time was the matter of the reorganization of the National Radiator Company first taken up?

A. The reorganization of the National Radiator Company or Corporation?

Q. The corporation.

A. Oh, I presume that was in the latter part of 1930 it was discussed.

Q. And who participated in that discussion?

A. Well, some of the bankers who were interested.

Q. Well, particularly, which bankers?

A. The Bankers Trust Company. They were largely interested.

Q. And what other bankers, if any?

A. Seligman & Company. They were largely interested.

Q. And was this particular plan discussed or considered before the default in the payment of interest?

A. No, not this plan. This plan was all promulgated afterwards, quite some time afterwards.

Q. But substantially a plan like this was considered? Is that right?

A. No.

Q. Well, now, was there any conclusion reached prior to February 1, 1931, that the company should be reorganized?

[fol. 624] A. It was discussed quite a number of times but just when or to what extent I can't recall at this date.

Q. Now, before February 1, 1931, when the installment of interest became due, was it at that time decided that the company would be reorganized?

A. No.

Q. When you sent out the notice on February 2, 1931, that is in evidence here as Exhibit 1, didn't you know at that time the company would be reorganized?

A. Well, it is possible no doubt there had been discussions to that effect.

Q. Did you consult with the Bankers Trust Company prior to default in the payment of interest.

A. Consult them with reference to what?

Q. That there would be a default in the payment of interest?

A. I presume so.

Q. Don't you know whether you did or not?

A. Well, I rather apprehend we did, but I can't just recall what conversation there might have been.

Q. Did they acquiesce in default of payment of interest?

A. I presume so, yes.

Q. And prior to October 1, 1931, was there an agreement they would act as depository under a reorganization plan?

A. I don't think so.

Q. Who is Mr. Cornell?

A. Mr. Cornell is president of the Cornell, Linder & Company who are engineers and make a specialty of assisting in reorganization of companies under similar conditions.

[fol. 625] Q. Who suggested his name as a member of the reorganization committee?

A. I am not prepared to say who that was.

Q. What is your best recollection in the matter?

A. I really wouldn't be able to say who.

Q. Would you say the Bankers Trust Company suggested his name?

A. No, I wouldn't say so.

Q. Was he ever affiliated with the Bankers Trust Company?

A. Not to my knowledge.

Q. Now, the plan was declared operative on September 16, 1931. Is that correct, Mr. Waters?

A. That is all a matter of record. I can't say.

Q. The record shows the plan was declared operative on September 15th or 16th, 1931.

A. That must be correct.

Q. Was any demand made by your committee, by yourself and fellow complainants, for the payment of interest which became due on February 1st and August 1st, 1931?

A. I am not prepared to say but I presume so.

Q. Was there anything agreed between the company and the committee that the interest would not be paid on demand? Was there a demand made upon the company for the payment of interest, Mr. Waters, prior to the bringing of this suit and the receivership?

A. I am not prepared to say whether there was or was not.

Q. Weren't you consulted in the matter?

A. I may have been.

[fol. 626] Q. Don't you recall?

A. Whether there was a demand made for the payment of the interest?

Q. Yes.

A. I presume there was.

Q. Upon whom was this demand made?

A. I think that you will find as a matter of record too. It is impossible for me to recall all these incidents. I think that, however, you will find as a matter of record.

Q. There was one demand made by the Bankers Trust Company some time around October 8, 1931? Is that correct?

A. I presume that is a matter of record too. It is impossible for me to remember all these dates.

Q. You know there was a suit started in New York County City Court, New York State, to recover interest coupons? That is, the action was brought against your company. Is that correct?

A. I believe there was.

Q. And you signed an answer in that case, didn't you, Mr. Waters?

A. Presumably did.

Q. And didn't you request the Bankers Trust Company after that suit was started to make demand upon your company for the payment of the interest?

A. I, personally? I would say no.

Q. Let me show you a copy of a letter sent to your committee by the Bankers Trust Company, and see if this will refresh your recollection.

A. Well, if it is a matter of record, I should say that is all that is required. You directed this to me personally.

[fol. 627] Q. This is a copy of a letter from the Bankers Trust Company to your committee.

A. I should say that anything that is a matter of record such as that is is better evidence than anything I might tell you from memory.

Mr. Palley: Will you concede, Mr. Teall, these are copies of letters sent and evchanged between the committee and the Bankers Trust Company and Chairman Wilcox?

Mr. Teall: These are no communications between Mr. Waters as president of the company and the Bankers Trust Company but between the complainants in this suit and Bankers Trust Company, and I suggest to save time and also for competence you should introduce in evidence those whole papers.

Mr. Palley: Papers on appeal in a case which was brought by Rae Berger against the National Radiator Corporation in the City Court in the City of New York and which was appealed on order of that court to Supreme Court, Appellate Term, First Department, and these are papers on appeal.

The Court: Very well.

(Paper marked Arzt and Ramsey Exhibit No. 3.)

Q. Now, Mr. Waters, is it not a fact that request was [fol. 628] made to the Bankers Trust Company to institute suit in this court for the recovery of interest coupons for the periods of February 1st and August 1st, for the purpose of using same as a defense in the Berger action?

Mr. Teall: If the Court please, I think that is going too far in this proceeding. I object.

Mr. Palley: It shows collusion in this case and if there is collusion, your Honor cannot either confirm the order of sale or confirm the reorganization plan.

The Court: I do not see the effect of that now.

Mr. Palley: The Bankers Trust Company is an intervening party.

Mr. Teall: Whether their motives were to have a defense to the Berger suit or whether their motives were to get their money, or as much as they could get, seems to me immaterial. These judgments have been entered of record and I submit it is going too far afield to inquire into this Berger suit in New York.

Mr. Palley: I have the right to prove the facts which would show there has been collusion in this suit and, therefore, this Court has no jurisdiction.

[fol. 629] Q. (Question read.)

A. That also I presume is a matter of record and was done, whatever it was, on the advice of our attorneys.

Q. But if the fact, Mr. Waters, is that that judgment was used as a defense in that action, then it was done for that purpose? Is that correct?

A. I am not prepared to say that. I presume that was the necessary course of procedure and, if it was, we followed it, but I am not competent to act in matters of that kind. Those are matters for the attorneys to handle.

Q. The Bankers Trust Company was very friendly in this entire matter, was it not?

A. Not wholly so.

Q. They were in favor of the reorganization plan, were they not?

A. To a degree.

Q. But as to the plan as finally formulated and obtaining the plan and agreement, were they not acceptable to that plan—finally?

A. Finally, I presume they were.

Q. And that was some time in February, 1931?

A. If it is so recorded, it is correct.

Q. And after that coordinated and cooperated with your committee in trying to put this plan into effect?

A. I wouldn't say it was a whole-hearted co-operation. That happened so. It was largely through interest of our own organization and other friends who solicited bondholders and stockholders to come in has succeeded in securing about ninety-six per cent.

[fol. 630] Q. They were the depositories for these other securities.

A. Yes, naturally, and trustees for the bonds.

Q. And the suits instituted in this court, one for the recovery of the interest and the other for the recovery of the principal on the bonds, were instituted at the request of your committee?

A. If it is so recorded. I am not prepared to say.

Q. Who handled these matters between the Bankers Trust Company and your committee?

A. That would be handled by our committee under the advice of our attorneys.

Q. Did you have a conference with any members of the Bankers Trust Company—any of the officials?

A. With regard to what?

Q. With regard to the plan?

A. Yes.

Q. And did they at that conference finally approve that plan?

A. I would say not. Not at one conference.

Q. Now, prior to the bringing of this suit in which the receivers were appointed, was there any discussions at which you were present, discussions at which the other members of the reorganization committee were present?

A. Prior to the bringing of the suit in the Pittsburgh court?

Q. Yes. The suit in which you are one of the complainants.

A. I presume there was some discussion.

Q. Well, were you present at any conferences?

[fol. 631] A. I have heard matters of that kind discussed.

Q. Will you answer my question, Mr. Waters? Were you present at any conferences at which the matter was discussed?

A. I presume. In fact, I would say I have been present at conferences when these matters were discussed.

Q. Who else was present at the conferences?

A. I couldn't say.

Q. Was any representative of the Bankers Trust Company present?

A. I don't think so. I don't think there was ever any representative of the Bankers Trust Company present.

Q. When you were present in what capacity were you present—as an officer of the National Radiator Corporation or a member of the Reorganization Committee or both capacities?

A. I would say as a member of the Committee.

Q. Was anybody representating the corporation?

A. I represented the corporation. If there was any representation needed, I was there to represent it, yes.

Q. At the time the Committee announced the adoption of the plan you were present at that meeting?

A. Yes.

Q. And you accepted that plan in behalf of your company? Is that correct?

A. Not on behalf of the company; on behalf of the security holders.

Q. And also on behalf of the company?

[fol. 632] A. I wouldn't say the company. That was out of the hands of the company.

Q. But the company was agreeable to the plan as put through?

A. There was no objection. In fact, they were quite favorable to it.

Q. And then it was agreed this suit would be started? Is that right?

A. Just when that was agreed upon I am unable to say.

Q. That was agreed some time before October 5, 1931, when the bill was filed. Is that correct?

A. I would say so, yes.

Q. And the reason for filing this bill was because certain bondholders had started suit upon their coupons? Is that correct?

A. I don't know it is correct but I presume it would be.

Q. Did you read the Bill of Complaint in this cause?

A. Well, if it is a matter of record, I don't believe it would be necessary for me to discuss it further.

Q. Don't you know as a matter of personal recollection whether that is so or not?

A. If you had attended as many meetings of our committee and various meetings, I don't believe you would be able to pretend to give the dates of them on the witness stand.

Q. Where was this last conference at which it was finally decided to bring this suit—where was that held—in New York or Pennsylvania, Pittsburgh or Johnstown, or where?

[fol. 633] A. I couldn't tell you.

Q. Were you present at the time when it was decided that the Reorganization Committee make demand upon the corporation for the payment of interest?

A. I would have to refer to the records to tell you.

Q. Is there any record in court here that would help you to refresh your recollection?

A. I presume there might be a minute.

Q. Then will you please look at the records and refresh your recollection on that point?

A. I don't have any records here.

Q. Is there a set of minutes of the Reorganization Committee meetings?

A. Yes, there were minutes kept.

Q. Are they in court?
A. I don't think so.

Mr. Palley: May I offer them in evidence? I offer them in evidence and ask that copies of those minutes be produced for the record.

The Witness: I think the minutes you are asking for are the National Radiator Corporation minutes.

The Court: Why didn't you give them notice to produce it in a timely way?

Mr. Teall: Everything that was requested on behalf of counsel was here in court.

[fol. 634] Mr. Palley: Your Honor, I didn't know there were minutes kept of the proceedings of the Committee. I learn now for the first time that there were. I learn now for the first time this witness could answer my questions that are asked him if those minutes were here. This Committee comes in and asks for approval of its plan. I say the minutes conducted by them on their plan and the promotion of that plan and the acquisition of bonds for that purpose are essential, and if I offer them carte blanche, sight unseen, I am taking the chance, not them, and I ask they be produced for the record.

The Court: They may be relevant or entirely irrelevant and immaterial in so far as any issue involved here is concerned, and it is a new practice with me to offer something that is not in sight at all or for consideration at all. They certainly need to be proven as the minutes by somebody before they can be received.

The Witness: I might say this: our Committee meetings were invariably held in the office of our attorney. Practically everything that was determined required a legal decision, and I would say that there were not complete minutes kept of these meetings at all times; simply memoranda, and the attorneys proceeded to do whatever was decided upon at that meeting.

[fol. 635] Mr. Palley: Will your Honor rule on my decision?

The Court: You undertook to offer certain minutes which were not produced and not identified in any way. I say you cannot do that. I sustain an objection to that if it was made, and I understood it to be made.

(Discussion off the record.)

The Court: It appears that there are minutes of the meetings, whether complete or not, and we will give them a reasonable opportunity to examine them. We will continue the hearing, until tomorrow morning.

(Adjournment taken until Friday, August 19, 1932, at 10:00 o'clock A. M.)

Friday, August 19, 1932.

Morning Session

JOHN H. WATERS RESUMED

JOHN H. WATERS resumes the stand.

Direct examination (continued):

Mr. Palley: If your Honor please, I presume I may consider as a part of the record various applications made by the receivers for leave of this Court to invest surplus funds of the corporation in Government and other securities, and [fol. 636] that the report as to such investments and the applications shall be deemed as part of this proceeding.

The Court: All right.

Mr. Palley (to opposing counsel): May I have the minute book of the corporation?

Mr. Royal: Might I interject at this point, your Honor, that I rather object to having the record unnecessarily encumbered, as far as it affects me here? I am not making this record, but I do not see occasion for throwing in all this——

The Court: We will let counsel have it for purposes of argument, and we will have to regulate it in case of appeal.

Mr. Palley: I offer in evidence at this time a copy of the minutes of the National Radiator Corporation of the meeting held on January 31, 1931, marked Exhibit No. 4, Artz and Ramsey.

I wish to offer in evidence just one paragraph of the minutes of the proceedings of the Executive Committee of the National Radiator Corporation held at Johnstown, Pennsylvania, January 10, 1931; and if I may read that into the record it will probably save time: "The Secretary reported that small amounts of debentures had been bought from [fol. 637] time to time under a resolution of the committee

passed at its meeting on July 14, 1930, and at this date there was an unfilled order in New York City for $5,000 principal amount to be purchased at 14¼ or better. In view of the probable re-arrangement of the corporation securities, the committee decided that no further purchases of debentures should be made for the present, and the Secretary was instructed to cancel immediately any unfilled orders."

Mr. Palley:

Q. Mr. Waters, Mr. Flershem was a representative of the banking interests on the board of directors of your company. Is that correct?

A. No, I would say he was not a representative of the banking interests; he was not so considered.

Q. Was he a stockholder of the corporation?

A. No, I don't think he had any stock.

Q. Was he a bondholder of the corporation?

A. Not to my knowledge.

Q. And although the record does disclose that fact—I am not familiar with it—will you tell me what office or offices he held in the corporation?

A. He was chairman of the executive committee.

Q. And a director of the corporation?

A. Yes.

Q. And at whose suggestion or recommendation was he elected a director and made a member or chairman of the executive committee?

A. I believe that I was the party that recommended Mr. Flershem for that position, although I am not sure. It was discussed at different times, but as to who originally sug- [fol. 638] gested it, I don't recall. I believe, though, that I did myself.

Q. Now, prior to the meeting on January 28th, and the adjournment to January 31, 1931, had there been any conferences with any representative of the Bankers Trust Company with regard to the proceedings to be taken at that meeting?

A. I am unable to state that, whether there was or was not. When you say conferences, what do you refer to?

Q. Well, whether it was communications of any kind, written or oral, or communications by any member of the board of directors, if you personally have knowledge of it.

A. I haven't any doubt but what I conversed with them at times, but to what extent I couldn't say.

Q. Well, did you discuss with them the matter of omission of payment of interest on November 1, 1931?

A. In all probability I did.

Mr. Palley: I presume, your Honor, from time to time, if necessary, I may consider as part of this proceeding, also, any testimony taken in any other proceeding in this cause. Am I correct?

The Court: Yes.

Q. Now, was an indemnity agreement given to the Reorganization Committee when they agreed to act pursuant to the resolution of the board of directors at the meeting held on January 31?

A. Was what?

Q. Was any indemnity given—Will you kindly look at [fol. 639] this last resolution (Exhibit No. 4), and state what if anything was done pursuant thereto?

A. I know of nothing beyond the resolution as it is recited there.

Mr. Palley: Now, may I have the minutes of the meetings of the proceedings of the Reorganization Committee?

Mr. Teall: If the Court please, on leaving court yesterday afternoon we communicated with New York by telephone, and have here this morning the minutes of the meetings of the Reorganization Committee, as requested by Mr. Palley. The only way to have these papers here this morning, to be sure they would be here. was to have them brought by special messenger, which has been done at the cost of at least $50. We believe that it is only proper to ask the Court to direct Mr. Palley to file in court here, when he has the necessary information, a statement of who owns the bonds covered by the petition of Miss Artz and the dates when those bonds were acquired by the beneficial owners of them.

(No ruling made on above request.)

Mr. Hubbell:

Q. Mr. Waters, under this reorganization plan your committee was given absolute discretion to pay claims in full

or of settlement either out of the funds of this defendant corporation or out of the new corporation. Now, will you tell us what your committee has done in that regard? Has it paid claims in full?

[fol. 640] Mr. Teall: If the Court please, I object to that, as immaterial, with whom the committee has settled. I don't think that has anything to do with this proceeding at all.

Mr. Hubbell: If your Honor please, here is a plan submitted as fair, which gives them the opportunity to treat creditors just as they see fit, instead of coming in as in bankruptcy or any other proceeding and treating every creditor fairly and equally; they can treat them arbitrarily, placing the money wherever it would do the most good, and leaving one creditor out without any standing in court——

The Court: What are you quoting from?

Mr. Hubbell: I am referring to page 10 to 19 of the plan, and asking him what has been done in that regard. The particular portion reads: "The Reorganization Committee shall have power, to be exercised in its absolute discretion, to consent to or arrange for the adjustment by payment, settlement or purchase of any and all claims and charges of every nature whatsoever which in the opinion of the Reorganization Committee shall be adjusted in connection with the consummation of this plan."

The Court: Go ahead and ask your question. We will overrule the objection.

[fol. 641] Q. (Question read.)

A. It would be impossible for me to say just what has been paid and what has not. The claim that you refer to, however, under advice of counsel, was one that we should not pay, hence did not pay.

Q. The one I refer to—do you mean by that the International Heater Company's claim?

A. Yes.

Q. Well, I mean——

A. Well, you referred to one and I naturally thought it was the one you were representing.

Q. You were a member of this committee from the very beginning?

A. Yes.

Q. And don't you know whether you have settled and paid claims or not?

A. Some of them I said were, and others were not, probably, for reasons due to advice of counsel. Many claims have not been settled.

Q, You say some were and some were not?

A. Yes.

Q. Now, which ones, if you can recollect, were paid in full?

A. It would be impossible for me to state here on the witness stand, without records before me.

Q. Do you have any record in court that would refresh your recollection?

A. I don't imagine so.

Q. Well, where is there any such record?

A. It would be in our office in Johnstown.

Q. The office of this Reorganization Committee is in Johnstown?

[fol. 642] A. The Reorganization Committee really has no office; we meet on call.

Q. Its records are in Johnstown?

A. With regard to the payment of claims, that is a matter that has been done on the advice of counsel by the corporation.

Q. I understood you a minute ago to say they were in Johnstown. Now, are they or are they not in Johnstown?

A. Yes, they are; I said so.

Q. And who is the person that has charge of them in Johnstown?

A. Mr. Resley.

Q. Mr. Carl Resley.

Mr. Teall: Just a minute. I don't know whether the witness knows you are talking about payment of claims by the Reorganization Committee instead of by the Receiver. That is a bit confused. I would like to have you make that plain, if you will.

Q. Mr. Waters, you have heard what Mr. Teall has said?

A. Yes.

Q. Which did you refer to, the Committee or the Receivers?

A. Well, some of these claims were settled previous by the Committee or on the advice of the Committee, previous

to the time the company was placed in the hands of a receiver. After that everything was done under the direction of the Receivers.

Q. Now, as I understood it—I am trying to find out how [fol. 643] I can find out who these creditors were that were paid off by the Committee.

A. Well, that would be found out only from our records.

Q. And the records you say are in the possession of Mr. Carl Resley at Johnstown?

A. Yes.

Q. This provision to which I call your attention also provides that they can be settled in the absolute discretion of your committee, either out of the funds of this defendant corporation or the new corporation. Now, those that you paid off in full, I suppose the money was taken from the National Radiator Corporation?

A. That is what I say.

Q. Are there claims that your committee intends to pay in full out of the funds of the new corporation or out of this million and a half dollars that you get out of this——

A. I am not prepared to say they will all be paid in full. That is a matter of adjustment.

Q. Now, I call your attention to the fact that the petition states that out of all the claims of general creditors against this company not one of them has been filed under this plan. Is that true?

A. Not one has been filed under this plan?

Q. That is right. Would you like to see the petition? I call your attention to the petition, and the words, after stating how many of the various securities have been filed, "that there has not been deposited with said depositary under the plan and agreement any assignment of claim of any general creditor of National Radiator Corporation, as is [fol. 644] permitted by Article 9 of said plan"—although I do not see that Article 9 does permit it. But the question is, do you know if that fact is true, that no general creditors filed an assignment of claim to participate in this plan?

A. I don't know whether any have or not. You refer now to a claim similar to your own——

Q. No; any general creditor.

A. I am asking you that question. You mean any person holding a claim similar to yours, whether they filed an agreement to accept securities of the new corporation for their claim? That is what you mean?

Q. Yes, but I mean any general creditor. I don't mean whether you consider it similar to ours or not, I mean any general creditor.

A. I can't recall that any have. There may be, but I don't know.

Q. Now, I suppose this record at Johnstown would also show what claims have been settled or purchased by your Reorganization Committee?

A. They would.

Q. And were there some settled and purchased—settled or purchased?

A. Beg pardon?

Q. Were there some claims settled or purchased?

A. Yes.

Q. And that record is also in the possession of Mr. Resley?

A. It would be in the office, I am sure.

Q. Now, your Committee is also given discretion under this agreement to permit creditors to participate in this plan. What creditors have you permitted to participate in this plan?

[fol. 645] A. None have been refused, as far as I know.

Q. What notice have you given to them that they may participate in the plan?

A. I am unable to say whether there was any formal notice sent to the creditors on that or not.

Q. What notice have you given the International Heater Company that they can participate in this plan or whether you in your discretion have determined that they are shut out of the plan?

A. Mr. Flershem, the Chairman of the Reorganization Committee, wrote the International Heater Company advising them that they could participate in this plan.

Q. Have you a copy of the letter?

A. I have not.

Q. Is that also in Johnstown?

A. No, sir; that would be in Mr. Flershem's office.

Mr. Teall: We have them right here, Mr. Waters, the whole correspondence (handing same to witness).

A. There is quite a bit of correspondence here.

Q. Well, do you want to put all the correspondence in evidence?

Mr. Teall: I think that would be helpful.

A. This letter is dated February (blank), 1931, addressed to the International Heater Company: "This is to confirm the arrangement made with you covering your participation in the abovementioned plan of reorganization. [fol. 646] International Heater Company is the holder of the following promissory notes of National Radiator Corporation, all bearing the date December 31, 1928, and bearing interest at the rate of six per cent per annum from their date and due upon the respective dates mentioned below: Principal amount $20,000, due December 31, 1931, another $20,000 due December 31, 1932, and another $20,000 due December 31, 1933. No interest has been paid on any of said notes. The amount of the interest accrued on said notes up to August 1, 1930, is $5700. International Heater Company, in respect of said notes, will participate in the abovementioned plan of reorganization upon the same basis as the holders of the 6½ per cent debenture bonds"—I can read further, if you want me to, but I think that is enough——

Q. I would like to see from what you are reading. (Witness hands paper to counsel.) This from what you are reading does not seem to be either dated or signed. Do you know personally that any such thing was sent?

A. I know very well——

Q. Do you know personally, not from what somebody told you?

A. I know that Mr. Flershem was directed to send such a letter, and he did.

Q. Did you see him?

A. No, I didn't see him mail it.

Q. Well, do you know otherwise than from some statement of somebody else that one was sent?

A. No; his own statement to that effect.

Q. Is he in court?

A. No, he is in Europe.

[fol. 647] Q. Now, Mr. Waters, do you know whether or not any notice at all was given to the International Heater Company that a sale of this property was going to be applied for, so that we had any opportunity to appear here in court and oppose such a sale?

A. I know of no notice other than the published notice that was given in probably twelve or fifteen papers

throughout the United States. Did you receive any of those notices?

Q. Wasn't that of the sale? That wasn't of the application to this Court, was it?

A. No, that was notice of the sale.

Q. Yes. Now, what I am asking you is if your committee or, so far as you know, the receivers or anybody else give this International Heater Company any notice that you were going to apply to sell out all of these assets, that we might come here to the Court and present our reasons why we thought that ought not to be done?

A. I don't know of any direct notice having been made to them.

Q. Now then, on the question of the fairness of the plan, if your committee determined that in its absolute and uncontrolled discretion a claim should not be paid, and that the holder of it should not be permitted to participate in this plan, what was that creditor to do?

A. I think the plan discloses that any creditor may participate, and your company had that opportunity.

Q. Do you think that my printed copy of this plan differs from the others? That is, is there anything about this copy [fol. 648] that I have that seems to be different from the one your own counsel has? (Handing same to witness.)

A. I wouldn't imagine that. Your company, however, had direct notice to that effect through Mr. Flershem, the Chairman of the Committee.

Q. Now, I call your attention to the language in paragraph 9 of this agreement that "In its discretion the Reorganization Committee, as provided in the plan, may arrange for the participation in the plan and under this agreement of any such claims or charges"——. Now, that is the language in the agreement, isn't it?

A. It would seem so, if you have read it correctly.

Q. Well, you read it and see if I have read it correctly.

The Court: Well, we will assume that you have.

Q. Now, is it true that all undisputed claims other than that of the International Heater Company have been paid or will be paid in full?

A. I am unable to say.

Q. You don't know of any that are to be not paid in full?

A. Yes, there are a number of disputed claims.

Q. I mean undisputed claims. Do you know of any undisputed claim that is not to be paid?

A. No, I don't recall any.

Mr. Teall: Well, all the debentures are undisputed claims.

[fol. 649] Mr. Hubbell: Of general creditors.

Mr. Teall: Well, they are general creditors, too. There is no mortgage.

Q. Well, other than the debentures then?

A. I do not.

Q. Now in the letters that you sent out, they state that it was the design to give fair treatment to all classes of securities. Was the question of claims outside of securities discussed, or was it the intention not to give fair treatment to those?

A. Naturally they were discussed, and it is in evidence, or at least I have so stated, that many of them have been paid.

Q. Now, what was the reason that this International Heater Company is the only general claim that is in this situation, not to be paid?

A. I am not prepared to say that it is the only one. On advice of counsel we were instructed not to pay that claim, that the only way that they could participate would be the same as the security holders, the bondholders.

Q. Now, isn't the real reason it was not to be paid that you were already in a controversy with the International Heater Company and in settlement of that we had already scaled down our claim about fifty per cent?

A. There was no controversy with the International Heater Company, so far as I recall, after final settlement was made with them, and I wouldn't call that a controversy previous to that time; it was just a matter of arriving at [fol. 650] some equitable basis for a settlement. Your company, as I recall, owned about one-third of the capital of these merged companies—or, if I recall correctly, two-thirds—and the stock was purchased. It wasn't a purchase of merchandise, as you stated yesterday; a big percentage of it was equipment and accounts, and all that sort of thing; it wasn't merchandise that was immediately turned into cash. I am not prepared to say what percentage, but I

think a very large percentage of that was equipment, which had no marketable value.

Q. Let us go into that and see if we don't agree more exactly. The Lincoln Radiator Company was situated at Utica?

A. Yes, sir.

Q. That was a corporation?

A. Yes, sir.

Q. A very profitable corporation—had shown profits from the very month it was organized. Is that your understanding?

A. I don't recall that; I had nothing to do with that.

Q. Do you think it was unprofitable?

A. I don't know that the profits were very great. In fact, I wasn't connected with it and had no knowledge of what they were doing.

Q. Well, you have already just told us that the National Radiator Company owned two-thirds of this stock——

A. No, no, not the National Radiator Company. That was the Utica Heater Company and the Continental Heater Company, and those companies were merged into the [fol. 651] National Radiator Corporation, and shortly after that there was an effort made by the Utica Heater Company—or the International—to either buy the National Radiator Corporation's interest or we buy theirs, so there was a merger along that line.

Q. Then after the merger of these plants the National Radiator Corporation owned two-thirds of the stock of the Utica?

A. I believe that is the proportion.

Q. And the International Heater Company owned one-third?

A. I believe that is correct.

Q. And you as the owners of two-thirds determined or decided to move that plant from Utica into one of the plants of the National Radiator Company at Tonawanda. Is that right?

A. That is correct, after we were unable to come to anything like a favorable lease with the Utica Heater Company, or the International; their demands were so excessive we couldn't agree to them.

Q. And you, in control of the board of directors, decided to move the plant to Tonawanda?

A. We did.

Q. That was against the advice of the disinterested manager of the Lincoln Radiator Company, who was not interested in either company, was he?

A. I am not prepared to say that it was; and I wouldn't consider that he was competent to judge.

Q. Well, the manager who had carried on the company successfully you feel was not competent to judge?

[fol. 652] The Court: Aren't we getting a little wide of the mark here?

Mr. Hubbell: Very well, your Honor, I will shorten it up.

Q. To make it brief, Mr. Waters, in order to get something for our stock, we sold out for these notes. Is that right?

A. In order to get something—what do you mean by that?

Q. Well, in order to get payment for our stock—some payment for it?

A. Yes; in addition to that there was quite an amount of equipment that the Lincoln Company had installed in the Utica plant, the International Heater Company, that was left there, for which they made no payment whatsoever, very valuable.

Q. Now, as to the question of whether this was merchandise or not, the Lincoln Radiator Company owned no real estate, did it?

A. No.

Q. Most of its equipment was left in the plant at Utica when it moved?

A. No; a great deal was left there, but all the equipment for manufacturing radiators and boilers, loose equipment, was moved. Cupolas and floor ovens and things of that kind that Utica had installed there were left, and practically no allowance made for them——

Q. That is what I say, they were left?

A. The Lincoln Radiator Company fared very well on that.

[fol. 653] Q. That is what I say. They were left at Utica, they were not moved to Tonawanda?

A. No; but that was a small part of the equipment. The machinery and the patterns and flasks, all of the loose material which was of great value—or of value—was moved to North Tonawanda.

Q. And these accounts receivable that you spoke of as turned over, were accounts receivable for merchandise sold?

A. Yes.

Q. And merchandise that was unsold was moved to Tonawanda or sold and changed into bills receivable?

A. Yes.

Q. Or accounts receivable. Now, did you also sell the Utica Heater Company plant, one of the plants of this merger?

A. Yes.

Q. How much did you get for that?

A. I am unable to say.

Mr. Teall: If the Court please, I object to this, as irrelevant. It is taking us away off.

Mr. Hubbell: If the Court please, the point of that is we are contending here these plants should be sold separately. Now, I desire to show that this one plant, which was a relatively small plant, was sold for about as much as this whole organization of these larger plants, if you count out this cash and equivalent of cash.

[fol. 654] Mr. Teall: That was years ago.

Mr. Hubbell: Not years ago.

Mr. Teall: 1928.

The Court: Well, hurry it along, it doesn't seem to be material to this case you have here.

A. Do you want an answer to that?

Q. Yes.

A. I am unable to say the amount it was sold for. It was sold, however, when plants were in demand.

Q. Do you know approximately?

A. I think it was around $700,000.

Q. And that sale did not include the Utica smokeless boiler and its patents, did it?

A. No.

Q. And it did not include the merchandise either, did it?

A. Yes, it included a considerable amount of merchandise, I believe. The hot air furnace business was taken over entirely, the merchandise, equipment, and so forth.

Q. And since that time have you sold other plants separately?

A. I think not. We have been trying for three years to sell, but have not been able to get an offer from anyone.

Q. You have not sold the Niagara plant?

A. No.

[fol. 655] Q. Mr. Waters, who were the board of directors at the time the management decided—the management requested you to become a reorganization committee, you and your associates?

A. Well, it was a large board; I couldn't name them all from memory.

Q. How many were there?

A. I think there were fifteen at that time.

Q. Fifteen?

A. Fifteen, I believe. Probably Mr. Resley has a list of that—Mr. Resley has a list of members.

Q. Is Mr. Resley here?

A. Yes.

Q. Was Mr. Cornell a member—a director?

A. No.

Q. All of these papers repeat that the management requested you to act as a committee. Whom does that mean?

A. Well, that means the board of directors and the management, the executive committee.

Q. Both the directors and the executive committee, is that right?

A. Yes.

Q. You were a director, were you?

A. Yes.

Q. And your son was a director?

A. Yes.

Q. Any of the rest of your family directors?

A. My brother.

Q. Now, was this the only possible plan besides liquidation?

A. We knew of no other at the time. We discussed it [fol. 656] at great length and for quite some time, but could arrive at no other conclusion that was possible. We were suffering, and the payment of the bond interest would very soon liquidate the company itself if we continued to pay it.

Q. If the creditors had liquidated the company, would the stockholders have received anything?

A. Not a dollar.

Q. This agreement provides that $90,902 to be paid by the common stockholders, if they take warrants, shall be paid to your Reorganization Committee. What becomes of that?

A. I think you will find that is shares, Mr. Hubbell, and not dollars. Does that not refer to shares and not dollars?

Q. Well, it provides for each share, if they want a warrant, they shall pay into your Reorganization Committee one dollar, which would mean $90,902.

A. That gives the common stockholders the option to subscribe for that.

Q. Yes; and if they do, and if they pay to your committee—if each one does subscribe, takes his warrant and pays, it would make a total of $90,902. Now, what becomes of that money?

A. That goes into the company.

Q. What?

A. That is an asset of the new company.

Q. The new company?

A. Yes.

Q. Not the old?

A. No.

Q. In other words, the creditors of the old company get no benefit from that?

[fol. 657] A. No.

Q. Now, this agreement provides that your committee, again in its discretion, shall fix its own compensation and shall pay the Bankers Trust Company and its counsel, and various other things. Have those amounts been fixed?

A. Not yet.

Q. Now, it says in this agreement, page 9, that that can be taken out of the sales—of the old company in some way, out of the defendant. Now, is it your intention to pay out of this sales price the Bankers Trust Company for bringing this suit, and its counsel, and to pay your committee out of this purchase price of the property?

A. It stipulates in the order for sale that all debts of the company will be paid by the new organization.

Q. Well, this agreement says it can be paid out of the old. Now, has that been definitely decided by your committee, that you are not going to make any claim on this purchase price?

A. That agreement was prepared before the company was in the hands of a receiver. And if a reorganization had been effected without a receiver's sale, I presume that is the way it would have been done.

Q. Now, it provides that you have a lien on the assets for your payment. What do you understand that lien is on now?

A. You mean for this committee?

Q. Yes, for the expenses of the committee and for paying the Bankers Trust Company and its counsel, and any other expenses that your committee decides you will pay. [fol. 658] A. I think you will find in the agreement that the committee has the right, if they so elect, to pay or to call upon the security holders for payment of these expenses.

Q. What I refer to, Mr. Waters, is this statement that all of these expenses to which I have referred shall be paid by the corporation or be assumed and paid by the new company. Now, I want to know which you are going to do? Are you going to take it out of this purchase price or are you going to have the new company pay it?

Mr. Bennett: What part are you reading from, Mr. Hubbell?

Mr. Hubbell: At the end of paragraph 9, on page 20.

A. Now, what is the question?

Q. These expenses of the committee and the Bankers Trust Company and its counsel, and all these other expenses, for advertising and printing, and legal expenses, and various other things, your Reorganization Committee is given absolute power to pay and given power to take it either out of the National Radiator Corporation or the new company. Now, I am asking you which you are going to do?

A. In the event of the same being confirmed, I would say that the expenses you refer to will be paid out of the assets of the new corporation.

Q. Has your committee decided that, or are you just giving us your guess on what you think ought to be done? [fol. 659] A. No, I am taking it from the statement set forth in the Reorganization Committee's reference to that, that that is the way it will be done.

Q. At any rate, you think personally that is the fair thing to do, don't you?

A. Yes.

Q. Although, of course, your committee under this agreement is given absolute discretion to modify it in any way you see fit, and at any time. That is so too, isn't it?

A. Just as it sets forth.

Q. Now, in a circular attached to this petition sent out to induce the security holders to deposit their securities, you and your associates say the corporation's present management assumed control of its affairs February 1, 1930. What does that mean?

A. Just what it says.

Q. Well, you had been chairman of the board right straight along, hadn't you, from the organization of the committee?

A. I was chairman of the board but not supposed to be active in the management.

Q. What change was there in the management that took place on February 1, 1930?

—. ——.

Q. Would you mind speaking a little louder? We can't hear you.

A. Mr. Norris, the man who had been selected to act as president and be the active president, and in the management of the affairs of the company—that was the only condition in which I would assume the office of chairman—took sick immediately before the consolidation was effected, and [fol. 660] while he made a desperate effort to function, he was in the hospital and confined to his home and hotel, he wasn't able to act, and we were without a president during that period, and he finally resigned, I think——

—. ——.

A. I say Mr. Norris resigned on or about March, 1928, and we were without a president for a considerable period, and Mr. Pierce was brought in to act in that capacity.

Q. That is, this change, Mr. Norris going out, was away back in 1928?

A. Yes.

Q. What I am trying to find out is, what change took place in 1930, when you tell these bondholders——

A. That is when Mr. Pierce, if I recall correctly, was brought into the organization as president, Mr. Flershem as

chairman of the board, and they were active in charge of the business there of the corporation from that on, for the period stated there.

Q. This says, "This is the same management which has had active charge of the old National Radiator Company at Johnstown?

A. Yes.

Q. Mr. Flershem never had anything to do with the National Radiator Company at Johnstown?

A. No.

Q. So it can't mean that?

A. Not wholly so, no.

Q. And Mr. Grant Pierce was an American Radiator Company man, wasn't he?

A. Yes.

Q. So he didn't have anything to do with the National——

[fol. 661] A. What date is that you are referring to?

Q. February 1, 1930. Would you like to look at the whole statement?

A. Well, that refers to the National Radiator Company. This is the National Radiator Corporation. That is the old company that was located at Johnstown, and not the Corporation. That refers to the National Radiator Company, an organization which had nothing to do with the present corporation.

Mr. Hubbell: For the purpose of the record, I am referring to Schedule "E".

Q. I understand that. But what I am trying to find out—You are sending out a letter to these security holders to induce them to deposit their securities, and you have sent them statements as to how bad the company has been in the past, that is, as to its losses. Now, you say the present management assumed control of its affairs February 1, 1930.

A. Yes.

Q. Now, who was it that came into the company February 1, 1930?

A. Well, Mr. Hubbell, that would refer particularly to the management of the old National Radiator Company, and not the National Radiator Corporation. The National Radiator Corporation was a consolidation of some six different com-

panies, and took the name of National Radiator Corporation. The company with which I was identified, and my associates, in Johnstown, before that consolidation, was known as the National Radiator Company, and that refers to the people who had charge of the old National Radiator Company, and so states.

[fol. 662] Q. I understand perfectly what the old National Radiator Corporation was——

A. No, no, that is "Company."

Q. Well, maybe not perfectly but still enough for our purposes. Now then, the ones connected with the old National Radiator Corporation, its principal officers had been the officers of this new corporation since its organization, hadn't they?

A. Not active in the management of it, however, as I explained to you.

Q. Why didn't you put Mr. Resley, for instance, who was one of your officers of the old National Radiator Company—You could have made him president of the Lincoln Radiator Company, couldn't you?

A. Why did we?

Q. No, not why did you, but did you?

A. I rather think we did.

Q. And he was active in the old National Radiator Corporation?

A. Old National Radiator Company—Please make that distinction there.

Q. Excuse me. And he became an officer and active in the management of the National Radiator Corporation?

A. Yes.

Q. And you were the head of the old National Radiator Company?

A. Yes.

Q. And you became the chairman of the board of directors of the new National Radiator Corporation?

A. I did.

[fol. 663] Q. Mr. Norris was practically to try to assist you, as a younger man, but a subordinate. Isn't that true?

A. I was not to be in active charge of the company's affairs, and that was the only condition on which I accepted the office of chairman of the board, that I would not be called upon to look after the details and the general business of the company; and when Mr. Norris, as I stated

before, became ill and was not able to carry it out, the company in effect drifted for a matter of about six months, until Mr. Pierce came in.

Q. Now, your son Robert Waters, one of the receivers, was active in the management of the National Radiator Company?

A. Yes.

Q. And he became executive vice president of the National Radiator Corporation?

A. Yes.

Q. And he didn't become that on February 1, 1930, but became that on the merger, didn't he, or shortly after?

A. I can't recall just when he became so.

Q. Well, it was long before February 1, 1930?

A. Well, it probably was.

Mr. Teall: If the Court please, I would like to object to further testimony along this line. I don't see it has any pertinency at all to the fairness of the reorganization plan, which is the matter to which we are now addressing our-
[fol. 664] selves. I object to it, as irrelevant and immaterial. The only purpose of my objection is to save the time of all concerned.

Mr. Hubbell: I don't expect it will, if your Honor please. My purpose in calling attention to it is that a great deal is said about ninety-six per cent of these securities are in; I am trying to show how they got in, by statements and representations of this sort, that cannot be justified on the stand.

The Court: Well, such weight as is to be given to them is, of course, to be considered; but the fact itself, speaks, doesn't it? You have gone all over that phase now.

Q. How many of these debentures did you personally own, Mr. Waters?

A. Around $1,000,000; I presume somewhat in excess of that. I don't recall the exact amount, but it was slightly in excess of a million dollars.

Q. Have they been deposited under the plan?

A. Yes.

Q. And has your preferred stock been deposited under the plan?

A. It has.

Q. And your common stock?

A. Not yet.

Q. Now, I notice, under this plan that anybody can become a party to this arrangement, this plan, and not deposit their securities. Do you know of anybody that has become such a party and has not deposited their securities? [fol. 665] A. Can become a party to the plan and not deposit their securities?

Q. Yes. Would you like to see that provision? It is in paragraph 3, on page 14: "The Reorganization Committee may, in its absolute discretion, permit the holder of any debenture and/or shares of preferred stock and/or common stock of the corporation and/or any creditor of the corporation to become a party to the plan of this agreement, without the actual deposit of their securities or claim." Now, do you know of anybody that has done that?

A. I do not. I don't think anyone has been given that permission. I presume that referred to the fact there might be some security holders who were not able to produce their securities at the time but declared their intention of depositing them. There were some security holders in Europe, some in Canada.

Q. Now, while the company defaulted on the interest on its debentures when it had ample funds, it continued to pay dividends on the preferred stock after it had no earnings, didn't it?

A. No, I don't think there were any dividends paid after there were no earnings.

Q. Are you sure about that?

A. I said I didn't think so.

Q. They were to be continued to be paid until August, 1928—or '29, is it?

A. I might say, in explanation of that, the radiator business is a seasonable business, and for the first six months or seven months of the year it is very seldom any money is made, the money is made in the afterpart of the year, and many companies pay their obligations out of previous [fol. 666] earnings or cumulative assets.

Q. A company in this business may run along during all of the first months of the year, up to September, showing a constant loss, and by the end of the year make a very large profit?

A. Yes.

Q. That has frequently happened in years past?

A. Yes. It has not been the case in the last two or three years.

Q. Well, this wasn't a favorable time to conduct a sale, was it—just before this boom period in the plants?

Mr. Teall: Boom period, did you say?

Mr. Hubbell: Relatively.

Q. But that is so in normal times, isn't it, Mr. Waters?

A. I will make this statement: That the committee had nothing to do with setting the date of the sale.

Q. You say, had nothing to do. You were the plaintiffs in the suit, weren't you?

A. I think the Court directed the sale.

Q. But the Court doesn't do it without the application of somebody?

Mr. Teall: If the Court please, I object to this arguing.

The Court: Yes, that gets us nowhere except to occupy time.

[fol. 667] Mr. Hubbell: I haven't any desire to occupy time, if your Honor please, but there are certain facts I would like to have on the record.

The Court: Well, it is on the record, I imagine, time and time again.

Q. Does any corporation of which you are a stockholder own stock or debenture in the National Radiator Corporation?

A. Not that I know of.

Q. It appears in the year 1928 that, from this plan in evidence, the company had a loss of $1,343,491. Is that right?

A. If that is taken from the books, it is correct, yes; and I presume it is.

Q. And it also appears that you continued to pay dividends until August 1, 1928. Now, what I was getting at was whether you desire to offer any explanation of that, and you have given it, but if there is any further correction counsel wants made——

Mr. Bennett: Simply the date.

Mr. Hubbell: In view of the fact your Honor does not desire me to take any more time, I will leave a lot I desired to ask.

The Court: Do not misunderstand me. I do not want you continually to be going over matters which already appear on the record. I do not want to be unreasonable [fol. 668] in my curtailment at all, but I want you also to make as much speed as you can conveniently.

Mr. Hubbell: I appreciate also that other counsel desire to be heard.

Mr. Royall:

Q. Mr. Waters. you said in answer to a question or two put by Mr. Hubbell that you knew of no notice having been given to the International Heater Company of the making of the application herein for the decree of sale. You so testified, did you not?

A. Yes.

Q. Do you know of any such notice having been given to any creditor of any class or type of the defendant corporation, of that application?

A. I do not know of any notice other than those published in the papers.

Q. What notices do you refer to as published in the papers—notices that were given after the decree of sale was made?

A. Yes.

Q. I am not talking about notices given after the decree of sale was made; I am talking about notices before the decree of sale was made, of the intention to come to this court to obtain such decree.

A. I will have to ask our attorney if such a notice was published.

Mr. Royall: Do you wish to make a statement whether you gave a notice to anybody, Mr. Teall, of the application on which the decree is based?

[fol. 669] Mr. Teall: I do not wish to make any statement. We published a notice of the sale all over the country.

Mr. Royall: I am not talking about that. I wish to have the record show what I understand to be the fact: that no notice whatsoever was given to anybody of the application that was made in this court for the obtaining of the so-called final decree of sale.

Mr. Hubbell: I think, if your Honor please, I would like to state what actually happened with me in that regard. I

had asked the firm of Alter, Wright & Barron, who I understand is a prominent local firm, to keep watch of this and give me any notice there was of any application to sell this property, so that we could come here, and be here, and the first that I heard of it was that someone connected with my clients said that I couldn't be watching very carefully, that they understood there was a proceeding, and I immediately communicated with Mr. Wright, and he said he would find out about it, and told me I had better come on here directly, and found out there had been a hearing and it was all over; and I was supposed to be representing my client, and had never known a thing about it. So that I feel sure no notice was given to Mr. Royall, or to me, or to the International Heater Company, or anybody else.

[fol. 670] Mr. Teall: Well, whatever the facts are, we as much as anyone want them to appear clearly on the record. Notice of the hearing was given to every person who was a party to the record. No notice of that hearing was mailed to the many, many persons who were not parties to the record, and I know of no requirement why it should have been done. There has been all the way through this proceeding, as I think my friends will agree, a very considerable newspaper publicity in financial papers and papers of general circulation, about this receivership.

(Informal discussion off the record.)

Q. You don't know of any notice? You have answered my question, have you?

A. I believe I answered that.

Q. And you said you didn't know of any such notice?

A. No.

Mr. Royall: Upon this subject of notice, I think I shall state upon the record my client's relationship to this, and my own, upon the subject of notice. I was retained by the First National Bank of Cincinnati even before the receivership, soon after the promulgation of the plan. And I called upon the attorneys for the Reorganization Committee—Mr. Bennett—and told him that we represented the First National Bank of Cincinnati. Conferences followed, some of which my client, Mr. Rowe, the president of the bank, sat [fol. 671] in, some of which Mr. Waters sat in, and some of which Mr. Bennett sat in, in various places, some in Cincinnati and some in New York, upon this whole subject matter.

Mr. Rowe urged that the plan, from his point of view, was conceived because the company's records showed nothing but losses and should be liquidated, and that the bondholders had better take their licking then, rather than wait a little while and get a worse one, and urged that view. I asked the gentlemen that when the time came that they would apply for receivership, that they should let me know. They did let me know that they had obtained the receivership. I then had an intervening petition, the one which is on file here, verified back in December of last year or January of this year—filed here to intervene. Whereupon I called upon Mr. Bennett and told him that I had this intervening petition, that this whole thing boiled down to one proposition, and that was a question of upset price, that the representatives of a great majority—presumably the majority—wanted the reorganization to go through, depending upon the fairness with which dissenters would be treated with respect to upset price; that rather than go down to Pittsburgh and have hearings upon upset price, I would rather talk it over man to man with them and consider the figures fairly, and arrive at what seemed like a reasonable thing. And I told him I would withhold, and I did withhold, the filing of my intervening petition while those discussions were going on. Those discussions were [fol. 672] delayed and delayed and delayed, because of the absence of Mr. Cornell, and this and that, and finally we did have a conference, when Mr. Bennett said, "Well, there is no use our talking any more." I said, "There is no use our talking any more, we can't get anywhere talking about it; there is nothing for me to do but file my intervening petition." Within a day or two I sent down the intervening petition to my associates, Baker & Watts, whom I had then retained for that purpose, and found that they were about to apply—the receivers and the other side, the Reorganization Committee, were about to apply for a final decree of sale. Our intervening petition, or return of the application, opposing our intervention, if your Honor will remember, was made returnable this very day this application was made by them. Although they knew all the while that we wanted to be here, we had no opportunity given to us——

Mr. Teall: All the way through you were informed.

Mr. Royall: We would not have been informed; we would have been in the same position Mr. Hubbell found himself in——

The Court: I think there is too much controversy. If it is not an accepted statement, I think you had better not have it in the record in this way. I know, as a matter of fact, you were heard, of course, in the matter fully, which is perhaps one of the main features here.

[fol. 673] Mr. Royall: By accident we were here and had that hearing in that way, at the last moment.

Mr. Teall: I do not want to get into a dispute about this matter——

The Court: It is a little irregular; and I am willing you put a stipulation in, but I do not want controverted matter put in in that way.

Mr. Bennett: The challenge to my integrity I think warrants my saying at least this: As soon as Mr. Teall and I arranged the time of hearing, at which the hearing would be brought up, I immediately got in touch with Mr. Teall and reminded him of our agreement to notify Mr. Royall of such hearing, and I understood such notice was given to counsel of record here.

Mr. Teall: I did; I called Mr. Baker as soon as the day for this hearing was fixed, pursuant to an oral understanding with Mr. Baker; I called him and notified him of the date, and he thanked me for my courtesy in doing so, although he was not at that time a party to the record.

The Court: Well, let us get on.

Mr. Royall:

Q. Mr. Waters, I call your attention to the circular letter [fol. 674] of your Committee, of March 18, 1931, addressed to the Security Holders of the National Radiator Corporation, which may be identified as Schedule "E" attached to the petition for the approval of the plan, and I direct your attention to these words: "During 1931 * * * the management has developed new and improved products of great promise, including among others steel boilers." Was that a correct representation?

A. It was.

Q. Are the steel boilers referred to there the product of the Steel Boiler Company, which has been testified to in the previous hearings in this matter?

A. They are.

Mr. Palley:

Q. As I understand it, under the reorganization plan, the common stock of the new corporation is valued at $20. Is that correct?

A. Not at that time.

Q. I mean at the present time, under the plan.

A. No.

Q. Well, if a person, common stockholder, wanted to convert one of his warrants into common stock of the new company, he would be required to pay $20 to the new company. Is that correct?

A. Yes.

Q. That would put a valuation of $20 per share upon the common stock of the new company, wouldn't it?

A. I would hardly think so.

Mr. Palley: I wish to offer in evidence letter which says: "Letter to be written by Mr. Erpf," dated March blank, [fol. 675] 1931, marked Exhibit No. 5, Arzt and Ramsey.

I wish to offer in evidence copy of settlement agreement dated September 15, 1931, between the Reorganization Committee and the Protective Bondholders Committee, of which Mr. Cahn was a member, as Exhibit No. 6, Arzt and Ramsey.

I now wish to offer in evidence letter sent by the Bankers Trust Company to Armand Erpf, Secretary of the Reorganization Committee, dated October 2, 1931, as Exhibit No. 7, Arzt and Ramsey.

I now wish to offer in evidence minutes of the Reorganization Committee, approving the agreement of settlement between the Reorganization Committee and the Cahn committee, dated September 17, 1931, as Exhibit No. 8, Arzt and Ramsey.

I wish to offer in evidence minutes of meeting of the Reorganization Committee held October 1, 1931, as Exhibit No. 9, Arzt and Ramsey.

I wish to offer in evidence minutes of a meeting held October 31, 1931, of the Reorganization Committee, as Exhibit No. 10, Arzt and Ramsey.

I wish to offer in evidence minutes of the meeting of the Reorganization Committee held on October 28, 1931, as Exhibit No. 11, Arzt and Ramsey, the same consisting of eight pages.

I will stipulate that copies of the exhibits marked contained in the minute book of the Reorganization Commit-
[fol. 676] tee may be substituted in lieu of the copies in the minute book. Is that agreeable, Mr. Teall?

Mr. Teall: Yes.

Mr. Wright: If the Court please, Mr. Teall and I have agred to facts which seemed to have been in controversy a little while ago, and I will state it for the record, if your Honor will permit. Mr. Hubbell and I knew about the receivership long before the hearing, but neither of us had any notice or any knowledge of the fact there was a hearing until after it was over, and neither of us conferred with Mr. Teall until March 18, 1932.

Mr. Teall: And the record will show what date their petition to intervene was filed on. I don't know that.

The Court: Is there anything further?

Mr. Teall:

Q. Now, Mr. Waters, let us get this business of management straightened out. "Management" is a rather loose term. Up to February, 1930—if I may put it this way—who was the active boss of the company?

A. The active man in charge from the time of the consolidation up until either February or March was Mr. Norris.

Q. Of what year?

A. The year 1927, in September, up until 1928. Mr. Norris resigned on account of illness.

[fol. 677] Q. Well, he was the head up to that time?

A. He was the head.

Q. Actively in charge?

A. Actively in charge.

Q. All right. Now, who was the next boss?

A. Well, there was Mr. Reed, who came to the organization from the Continental Heater Company; he was with us about a year following that as the general manager of plants and manufacturing. My son was—well, he was one of the vice presidents and took part in the management, too.

Q. Now, that carries us up to when?

A. That carries it up to nineteen—When did Mr. Pierce come into the organization, Mr. Resley?

Mr. Resley: September 1, 1928.

A. Well, that practically took care of things until September 1, 1928, when Mr. Pierce was made president and in active charge of the company's affairs.

Q. And how long did he continue president and in active charge?

A. He continued until some time in the early part of 1930.

Q. Up to that time, from the organization of the company to February or early in the year 1930, what had been your position with the company?

A. My position was chairman of the board.

Q. Now then, early in the year 1930 did your position change in any way?

A. Well, I don't—I am not sure, I believe I was a member of the executive committee. Mr. Flershem came in [fol. 678] and became chairman of the executive committee——

Q. Just a moment. I am going to cut you short, for purposes of brevity. You were president of the company at the time of the receivership?

A. Yes.

Q. The active head of the concern?

A. Yes.

Q. How long had you been in that position?

A. I had been in that position, I believe, since February, 1930.

Q. That was the time when you come back as president and active head of the concern?

A. Yes.

Q. And you so remained until the receivership?

A. Yes.

Q. Laying aside questions of what the word "management" means, and all that, you have been the active head of the concern since February, 1930, down to the date of the receivership?

A. Yes.

Mr. Hubbell:

Q. Mr. Waters, by Mr. Norris you mean Edward Norris of Utica, New York?

A. Yes.

Q. While you were chairman of the board of directors, and Mr. Norris was president, did you differ as to policies of the company?

A. I don't recall any special differences. One of the statements that Mr. Norris made to me when he became president, he said "Now, the understanding, Mr. Waters, [fol. 679] is that I am going to be president and in active charge of the company's affairs." I told him that was the position I wanted him to fill.

Q. And did he get out because he couldn't be president and you continue to be president in fact, although not in name?

A. No, he got out on account of his illness.

Q. Now, didn't he want to continue these plants operating as separate plants, and not consolidate them all down at Johnstown and New Castle, and you insisted upon doing it the other way? Isn't that the fact?

A. I don't recall Mr. Norris ever having been a party to any such suggestion. I remember Mr.—Oh, the Niagara Radiator Company man, Mr.—What is his name?

Q. Mr. Andrews, do you mean?

A. Mr. Andrews, he was very positive in that direction, but I don't recall Mr. Norris having insisted on any part of it.

Q. Well, you continued to take quite an active part during Mr. Norris's presidency, didn't you?

A. He consulted with me somewhat. I went south in the winter when he was left in charge. He was at the hotel the greatest part of the time, and the men in the different departments consulted him every day, went to his home, and he finally moved to Johnstown, and when he wasn't able to be present at the office they went up and consulted with him, he would see every day people from the organization, in order to get his advice and directions.

Q. But it is true Mr. Norris resigned and got out, isn't it?

[fol. 680] Yes.

Q. Now, you say Mr. Reed came in—that is Earle Reed?

A. Yes.

Q. Did you and Mr. Reed differ as to the policy and management of the company?

A. I really don't recall of ever discussing but very little any of the affairs with Mr. Reed, who was in charge of the

manufacturing and I had little or nothing to do with that.

Q. And did Mr. Reed finally get out because he wasn't permitted to run the plants in the way he thought was the proper way to run them?

A. No; Mr. Reed came to me one day and said that the job was entirely out of his ability to handle, that he had been accustomed to handling one small plant, and this was a bigger job than he could handle, and he was then interested in starting a small company for himself. He had hardly quit the employment with our company until he was engaged in the organization of another company.

Q. Was Mr. Reed afterwards a member of this committee that sent out circulars advising the security holders not to deposit their bonds because of the bad management of the company?

A. I believe he was. He, however, deposited his bonds with our committee.

Q. And by Mr. Pierce you mean Grant Pierce?

A. Yes.

Q. Was he put in at the request of the Bankers Trust Company?

A. I wouldn't say wholly. They were consulted, yes.

[fol. 681] Q. And after some change in stockholdings, did you suggest that Mr. Pierce resign?

A. Yes, I did—I don't know what you refer to by change of stockholdings.

Q. Well, didn't your interest in the company increase during that interval, when the Bankers Trust Company suggested that Mr. Pierce come in and the time when you suggested he get out?

A. Had it increased in the meantime?

Q. Yes.

A. Yes; but that had nothing to do with the request that he get out.

Q. When did Mr. Flershem become president?

A. He is not president, he is chairman of the executive committee.

Q. He never was president?

A. No.

Q. And when did he become chairman of the committee?

A. I can't recall that date.

Q. Was it the same time that you became president?

A. I believe it was. You can probably find that in the minutes.

Q. Well, we will say about that time.

A. Yes.

Q. But Mr. Flershem, who became chairman of the board and head of the company at that time, never had had any connection with the old National Radiator Company, had he?

A. No.

Q. So that, on February 1, 1930, instead of the head becoming one of the old National Radiator Company, it was a [fol. 682] man who had never had any connection with the company?

Mr. Bennett: I don't think that question is clear.

Q. Mr. Flershem became chairman of the board of directors at about the time that——

A. Chairman of the executive committee.

Q. Wasn't he chairman of the board, too?

A. No.

Q. He became chairman of the executive committee at about the time you became president, and that you say was about February, 1930?

A. Yes.

Q. And he never had had any connection with the National Radiator Company?

A. No.

Q. And on that day he became head of the National Radiator Corporation?

A. I wouldn't say so. He was chairman of the executive committee, and I was president of the corporation, and what is meant by "practically the old management" was all the active people in the company; our former sales managers and secretary and treasurer and plant managers, and all that, is what is meant by "practically the old organization."

Q. Well, wasn't the old organization—Didn't the leading men in it consist of your son Robert Waters, and Mr. Resley, the secretary of the company?

A. Yes.

Q. And who else?

A. And our sales manager, Mr. Morgan, and our district managers in charge of our different offices, our plant man-

[fol. 683] agers; that is what is referred to there, as these old men were then in active charge, which was practically the old National Radiator Company organization. Mr. Flershem was brought into the organization due to his knowledge of the sales end of the business. He had been vice president and general manager of sales for the American Radiator Company for a number of years, and sales development was one of the things we felt we needed, and Mr. Flershem was brought into the organization with a view of assisting more particularly in that direction.

Q. And that was a change of management away from the system of the old National Radiator Company?

A. I would say not. It was augmented.

Q. It was what?

A. It was augmented by getting a man with a very large experience in that direction in with us.

Q. So that the system had not been changed but was augmented?

A. Yes.

Q. The general manager of the company had been right the same one from the time of the reorganization, hadn't he?

A. The general manager?

Q. From the time of the merger—the vice president and general manager?

A. Vice president and general manager—I don't recall that title.

Q. Executive vice president and general manager.

A. Yes, executive vice president.

[fol. 684] Q. The executive vice president and general manager had been the same person, and that was your son Robert Waters, who is one of the receivers, from the time of the merger?

A. Yes, I believe he filled that position.

(Several letters marked Complainants' Exhibit No. 2, a to f, inclusive.)

Mr. Teall: Complainants offer their Exhibit No. 2, which will be given sub-letters "a" to "f," being letters and copies of letters, six in number, between February 13, 1931, and May 23, 1931, for the purpose of showing that within a very few days after the publication of the reorganization plan the attention of International Heater Company was

drawn to it, and International Heater Company was expressly advised of its right to come into the plan and declined to come into it.

Mr. Royall:

Q. Just one thing to make the record a little more complete. I believe, although I am not quite sure of this, that while you were on the stand today you indicated that the Corporation had before the promulgation of the plan gone into the market and acquired some of its own debentures. Is that a fact?

A. Yes.

Q. Will you please state to what extent they have done so, how many debentures they acquired?

A. I don't recall; probably fifteen to twenty thousand of them.

Q. Rather a trivial number, comparatively speaking? [fol. 685] A. Yes.

Q. Do you know what was done with those? Were they deposited with the Committee or how were they handled?

A. I don't think they were, but I am not positive about that.

Q. Well, if they were not deposited with the Committee, how do you think they were handled?

A. I really am unable to say how they were handled, whether they were held in the treasury of the company or whether they were deposited. Mr. Resley can answer that question.

Mr. Teall: I think it appears in the bill of complaint that they were cancelled; I think it is in the bill.

Mr. Watts: If the Court please, we desire to file a supplemental objection to the plan of reorganization, adding an additional reason for the Court's action in refusing to permit it or approve it, and ask that this objection be marked filed by the Clerk.

Exceptants rest.

(Recess taken until 1:30 o'clock P. M.)

Afternoon Session

(Note.—Upon request of counsel, complainants' case is reopened for the production of an additional witness.)

[fol. 686] TESTIMONY OF WILLIAM G. HEINER

WILLIAM G. HEINER, a witness produced on behalf of complainants, having been duly sworn, testified as follows:

Direct examination.

Mr. Teall:

Q. Mr. Heiner, you are one of the receivers for National Radiator Corporation, the defendant in this case?

A. Yes, sir.

Q. Have you, at request of counsel, examined your records for the purpose of ascertaining the amount of claims of general merchandise creditors that would be paid under the proposed reorganization plan?

A. Yes.

Q. What is the aggregate amount of such claims?

A. $42,712.85.

Q. Could you give us any general idea of the amounts of those various claims? Are they large amounts, small claims, or what?

A. The total number of claims applicable to that aggregate 396.

Q. To make up the forty-two thousand dollars?

A. That is right.

Cross examination.

Mr. Hubbell:

Q. You said there were forty-two thousand?

A. $42,712.85.

[fol. 687] Q. Do you know how many or the amount of the claims paid by this Reorganization Committee before the property came into the hands of the receivers?

A. No, I do not.

Q. In the preparation for this suit?

A. No, I do not.

Q. In 1930 there seems to be one item of taxes here, and other accounts accrued, $151,000. Do you know anything about that, what it was?

A. No, I do not.

Q. So that that may have consisted of creditors in a similar situation to the International Heater Company, that the Reorganization Committee paid off?

A. I couldn't tell you.

Mr. Palley:

Q. What is meant by "Payment in full for liabilities due for services"? Who comes within that classification?

A. Well, I don't know. Do you want my opinion on it?

Q. Well, are there any unpaid claims for services rendered to the corporation prior to your appointment as receiver?

A. Yes, I should say there are.

Q. And could you give us the amount of those claims, the total?

Mr. Teall: What do you mean by "service," Mr. Palley?

Mr. Palley: I will get that in the next question, I think.

[fol. 688] A. I will have to compute that from our receivers' report.

Q. Well, approximately?

A. I can't give it to you approximately.

Q. Well, give me the names of some of the persons to whom money is due for services rendered, and the amounts?

A. L. L. Carr for commissions in the amount of $40.50

Q. When did that accrue?

A. I can't tell you the date; it is not shown; but prior to the receivership.

Q. Do you know whether that claim was in existence in February, on or about February 1, 1931, at the time of the default in the payment of interest?

A. I can't tell you that.

Q. You wouldn't be familiar with that?

A. I would not.

Q. You don't know whether any of these claims for merchandise or claims for services were paid some time between February 1st and the time of your appointment as receiver?

A. I don't know anything about that.

Q. Now, will you answer this: Is there any money due to any of the Waters for services rendered?

A. I think there is a claim here for salary.

Q. Will you give us the names of which Waters and the amounts?

A. Robert S. Waters, unpaid salary, $222.20.

Q. Do you know what period of time that covers?

A. Yes, that was for the period October 1 to October 9, 1931; for the portion of the month of October, 1931, preceding the appointment of the receivers.

[fol. 689] Q. Are there any other officers—I am particularly interested in the officers and directors of the corporation—to whom there was any money due for services at the time you took possession as receiver?

A. Offhand, I don't think of any——

Q. Well, from your list?

A. Well, if you will give me the names, I will check that.

Q. Well, how about Mr. John H. Waters? Did he collect a salary or was there anything due him?

A. There wasn't anything due him, according to my report.

Q. How about Samuel B. Waters?

A. There is no claim for salary, by Mr. Samuel B. Waters.

Q. Mr. Resley?

A. There is no claim for salary by Mr. Resley.

Q. Are you familiar with the method of payment of salaries by the corporation, that is, the method which was in vogue prior to the time you took possession as receiver? I presume the same method was continued after your possession?

A. I don't know.

Q. Well, how were salaries paid, monthly, bi-monthly, or weekly, or how?

A. Executive salaries, that is, administrative salaries, were paid monthly, and wages paid semi-monthly.

Q. And were they paid monthly in advance or at the end of the month?

A. At the end of the month, after the work and services are performed.

[fol. 690] Q. And you wouldn't have any information, as to what, if any, moneys were due to any of the Waters or any of the officers of the corporation after February 1, 1931?

A. I would not, unless it was the subject of a proof of claim, and that is the only one I know of.

Q. For all you know, they might have been paid?

A. They might have, for all I know.

Q. Then by "services" you understand to mean salaries due what we might call officers of the corporation, executives, or white-collar employees, and any wage earners who are given priority, I presume, under the statutes of this state?

A. Well, the decree authorized us to continue the payment of current and unpaid payroll.

Q. But you would distinguish between wages and services—liability for services—wouldn't you? You are an attorney, aren't you?

A. Yes.

Q. And wages are given priority under the statutes of the State of Pennsylvania, I presume?

A. I think they are.

Mr. Teall:

Q. Well, in that service, state whether or not there is included telephone, and water, and delivery service, and various things of that nature?

A. That is right; I would say they are also included.

Q. Under the term "services"?

A: Yes.

(NOTE.—After adjournment of the hearing in this case, the witness W. H. Heiner stated that upon further investi-[fol. 691] gation he found that the amount of $42,712.85, amount of general merchandise claims paid under the proposed reorganization plan, as given in his testimony above, is incorrect, and that the correct amount should be $40,-075.15.)

Complainants rest.
Testimony closed.

Reporter's certificate to foregoing omitted in printing.

IN UNITED STATES DISTRICT COURT

MEMORANDUM—Filed Sept. 8, 1932

GIBSON, District Judge:

Prior to the order for sale in this matter, this Court heard creditors of the defendant corporation, who objected to the reorganization scheme proposed by the plaintiffs. [fol. 692] Upon consideration of the reorganization proposed, subsequent to that hearing, we felt that the obligations of the corporation were considerably greater than its tangible assets and that the reorganization proposed was proper and worthy of the approval of the Court. After the sale of defendant's properties was made and exceptions filed to the Receivers' return, we again heard creditors objecting to the reorganization and exceptions to the confirmation of the sale. Upon consideration of the testimony offered at such hearing, we have not been led to a change of opinion in respect to the good faith of the reorganization scheme, and the power and duty of the Court to approve it, as expressed in a prior opinion under this number, and also in opinion in the case of Lily Clapier v. Rudolph B. Flershem, et al., and National Radiator Corporation, at No. 2597 In Equity.

The exceptions relating to the conduct of the sale are of no weight and must be dismissed.

IN UNITED STATES DISTRICT COURT

DECREE CONFIRMING SALE AND APPROVING DEED—Filed Sept. 8, 1932

This cause came on to be further heard at this term pursuant to Section 34 of Article VI of the Final Decree of Sale made and entered herein by this Court May 31, 1932 (hereinafter called the "Final Decree"), on the Receivers' Report of Sale dated August 8 and filed herein August 12, 1932, on the petition dated and filed herein August 17, 1932, of G. Franklin Ludington and Carl E. Resley (here- [fol. 693] inafter sometimes called the "Purchasers"), and on the petition dated and filed herein August 17, 1932, of National Radiator Corporation, a Maryland corporation

(hereinafter called the "New Company"), as assignee of the Purchasers, and on all other proceedings in this cause, and upon the hearing on the aforesaid Report of the Receivers, and was argued by counsel, and thereupon, upon consideration thereof, this Court being fully advised in the premises, it is

Found, ordered, adjudged, and decreed as follows:

1. Neither the defendant National Radiator Corporation (hereinafter called the "Corporation") nor anyone on its behalf nor anyone else, within 10 days after the entry of the Final Decree or at any other time, has paid or caused to be paid, in accordance with the provisions of Section 29 of Article V of the Final Decree, the sum specified in said Section 29 or any part thereof.

2. The Receivers appointed by this Court by Decree No. 1 in this cause dated October 9, 1931 (hereinafter sometimes called the "Receivers"), and in and by the Final Decree ordered in person or by their duly appointed agent to execute the sale (hereinafter called the "sale") of the property owned by the Corporation and/or said Receivers and directed by the Final Decree to be sold, have fully complied with all the directions contained in the Final Decree in naming the day and hour of sale and conducting the same as required by the Final Decree; the Notice of Sale referred to in the Final Decree was duly published as in and [fol. 694] by the Final Decree directed; the statements required by Section 54 of the Final Decree to be filed were duly filed; the sale was duly made on August 8, 1932, in all respects as provided by the Final Decree; and at said sale the Receivers duly sold at public auction to the Purchasers G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, they being the highest and best bidders at said sale, all the property in and by the Final Decree directed to be sold in one parcel as an entirety for the sum of $2,550,000, said sum being the highest bid for said property and being in excess of the minimum amount required by the Final Decree to be bid for said property when offered in one parcel as an entirety and being equal to the aggregate of the highest bids noted for the parcels comprising said property when said parcels were offered for sale separately.

3. On July 30, 1932, said date being more than 24 hours prior to the offering by the Receivers of any property for sale under the Final Decree, the aforesaid G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, deposited with the Receivers and delivered to them, as a pledge that they would make good their bid or bids and as part payment of the purchase price of said property in case of the acceptance of such bid or bids, a certificate of Bankers Trust Company, a trust company in New York, N. Y., that it held subject to the order of the Receivers $1,000,000 principal amount of 6½% Sinking Fund Gold Debentures of the Corporation, in bearer form and accompanied by the coupons thereto appertaining due February 1, 1931 and all subsequently [fol. 695] maturing coupons, and said Purchasers simultaneously filed with the Receivers their statement that they proposed to bid for said property on behalf and for the benefit of a corporation or corporations organized with the intention that such corporation or corprations shall become the owner or owners of said property or some part thereof or some beneficial interest therein, pursuant to and for the purposes of the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, as augmented by the provisions set forth in a certain letter dated September 16, 1931, issued by the Reorganization Committee constituted under said Plan and Agreement and made a part thereof (said Plan and Agreement as so augmented being hereinafter called the "Plan and Agreement"), and being the Plan and Agreement referred to in Section 16 of Article III and in Section 36 of Article VIII of the Final Decree, which said Reorganization Committee, by its petition duly verified July 26, 1932, entitled in this cause and filed with the Clerk of this Court on July 29, 1932, has petitioned this Court to approve.

4. In the manner prescribed in Section 36 of Article VIII of the Final Decree the Receivers duly published a notice that a copy of the Plan and Agreement, under which the successful bid of the Purchasers was made, has been duly filed with this Court and might be examined by anyone wishing to do so at the office of the Clerk of this Court, and that at the time and place named in the Final Decree

this Court would hear complaints as provided in the Final Decree as to the equity of the provisions of the Plan and [fol. 696] Agreement affecting the respective priorities of all persons and corporations interested in the Corporation and its property, from all Debentureholders or other creditors, secured or unsecured, of the Corporation, who before the date of such hearing should file, with leave of this Court, their petitions herein for such purpose.

5. The aforesaid G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, have duly assigned, transferred and set over unto the New Company, its successors and assigns, for the purposes of the Plan and Agreement, all their right, title and interest in and to the property described in the form of deed hereto annexed marked Exhibit A, being all of the property sold to them as aforesaid; their right to receive a deed or deeds or other instrument or instruments of conveyance or assignment and transfer of said property; their successful bid at the sale under the Final Decree; their rights and interests under the Final Decree as the successful bidders for said property; and their right to receive all cash (less the sum of $300,000 to be retained by the Receivers, as in Section 43 of Article X of the Final Decree provided, as a payment on account of the total purchase price of said property sold) and all current assets, materials and supplies in the possession of the Receivers.

It is therefore ordered, adjudged, and decreed as follows:

6. The provisions of the Plan and Agreement affecting the respective priorities of all persons and corporations interested in the Corporation and its property are equitable [fol. 697] and said Plan and Agreement contains an equitable and timely offer of participation in the reorganization thereby proposed to all persons entitled thereto, of which due and reasonable notice has been given, and all complaints as to the equity of the provisions of said Plan and Agreement made at the hearing before this Court August 18, 1932, are hereby found without merit and overruled. The Reorganization Committee constituted under the Plan and Agreement, or their successors, are hereby authorized to carry out and consummate said Plan and Agreement and all persons, firms and corporations are forever barred from making hereafter any complaint in respect of said Plan

and Agreement or any of the provisions thereof. If, prior to the execution and delivery of the deed or deeds by this Decree authorized, the Plan and Agreement should be modified, said Reorganization Committee, as parties complainants in this cause, shall file a copy of such modifications with this Court. Thereupon, the Receivers shall publish notice, in the manner provided in Section 36 of Article VIII of the Final Decree, of the filing of such modifications and of the hearing to be held thereon before this Court 14 days after the publication of such notice, and this Court reserves the exclusive jurisdiction at such hearing to hear complaints as to the equity of the provisions of such modifications affecting the respective priorities of all persons and corporations interested in the Corporation and its property, from all Debentureholders or other creditors, secured or unsecured, of the Corporation, who before the date of such hearing shall file, with leave of this Court, their peti- [fol. 698] tions herein for such purpose, specifying in reasonable detail the particulars in which such modifications are alleged by them to be inequitable, and this Court reserves exclusive jurisdiction to determine whether the provisions as to which such complaints are so made are equitable.

7. The Receivers' Report of Sale is hereby in all respects confirmed and the sale therein reported, namely the sale to the aforesaid G. Franklin Ludington and Carl E. Resley, as joint tenants and not as tenants in common, of all the property of every kind, character and description in and by the Final Decree directed to be sold in one parcel as an entirety for the sum of $2,550,000, is approved, confirmed and made final and absolute; subject, however, to all the terms and conditions of this Decree and of the Final Decree and to the rights and powers reserved to the Purchasers and to their assigns and to this Court in and by this Decree and in and by the Final Decree.

8. Upon the confirmation of the sale as to so much of the property sold as is situated within the territorial jurisdiction of the courts in which are pending the ancillary causes mentioned in Section 8 of Article II of the Final Decree, and in advance of the delivery of the deed or deeds by this Decree authorized, a further payment on account of the purchase price of the property sold to the Purchasers shall,

except as this Court may by its order or decree otherwise permit, be made by the turning over to the Receivers, to be credited on account of such purchase price as provided in Section 44 of Article X of the Final Decree, Debentures [fol. 699] and/or coupons and/or assigned claims entitled to be paid out of the net proceeds of the sale on distribution thereof in the sum of $9,000,000. The Receivers may accept, in lieu of all or any part of the Debentures and/or coupons and/or assigned claims required to be turned over pursuant to this Section, a certificate or certificates of any bank or trust company in New York, N. Y., Pittsburgh, Pa., Chicago, Ill., or Boston, Mass., acceptable to them, that it holds subject to their order, such Debentures and/or coupons and/or assignments of claims against the Corporation finally established and allowed.

9. There shall be credited on account of the total purchased price of $2,550,000 bid for the property sold at the sale

(a) The sum of $300,000 in cash, to be retained by the Receivers out of the cash in the possession of the Receivers; plus

(b) The distributive share out of the net proceeds of sale, as determined by this Court in accordance with Article XI of the Final Decree, of the Debentures and their appurtenant coupons held subject to the order of the Receivers pursuant to the certificate of Bankers Trust Company deposited with said Receivers by the Purchasers, as stated in the Receivers' Report of Sale, as a pledge that said Purchasers would make good their bid or bids in case of the acceptance thereof; plus

(c) The distributive share out of the net proceeds of sale, as determined by this Court in accordance with Article [fol. 700] XI of the Final Decree, of the Debentures and/or coupons and/or assignments of claims which (or certificates of interest in which) shall be delivered to the Receivers pursuant to Section 8 of this Decree.

No further payment shall be required on account of the total purchase price of $2,550,000 bid for the property sold at the sale until this Court shall so require, but this Court reserves exclusive jurisdiction from time to time, upon

application of any holder of Debentures or coupons appertaining thereto or claims entitled to share in the proceeds of sale, to require, in accordance with the provisions in that regard of the Final Decree and the order of distribution to be entered pursuant to the Final Decree, such further payment or payments on account of said total purchase price as this Court may from time to time direct, and this Court reserves a lien and charge upon the property sold at the sale, subordinate only to the right reserved by Section 42 of Article IX and the liens mentioned in Section 32 of Article VI of the Final Decree, for the payment in full of the purchase price thereof and the right to resell such property or any part thereof, upon such notice as it may direct, at the risk and cost of the New Company, in case the New Company shall fail or omit to make any payment on account of such purchase price within 20 days after the entry of the order requiring such payment or if an appeal be taken from any such order, within 20 days after the service of written notice of the final affirmance of such order upon appeal.

10. The New Company shall take the property sold as in the Final Decree directed and shall receive the deeds by [fol. 701] this Decree authorized, subject to the express condition that it shall, as provided in the Final Decree, pay in full the purchase price thereof, including the assumption of all obligations of the Receivers which under Section 42 of Article IX of the Final Decree are required to be assumed by the Purchasers as a part of the total purchase price of said property, and in addition to the amount of the accepted bid for said property, and this Court expressly retains jurisdiction of the property so purchased, as against all other provisions of the Final Decree and this Decree, and reserves the right to retake said property or any part thereof sold under the Final Decree and apply it, to the satisfaction of said obligations in case the New Company shall fail to comply with any order of this Court directing such performance within 20 days after the service of a copy of such order, or, if an appeal be taken from any such order, within 20 days after the service of written notice of the final affirmance of such order upon appeal.

11. Upon the confirmation of the sale as to so much of the property sold as is situated within the territorial

jurisdiction of the courts in which are pending the ancillary causes hereinabove mentioned in Section 8 of this Decree, and upon the turning over to the Receivers of the Debentures and/or coupons and/or assignments of claims (or certificates of interest therein) required by Section 8 of this Decree to be turned over to the Receivers in advance of the delivery of the deed or deeds by this Decree authorized, the Receivers are directed to execute and deliver to the New Company a deed of the property [fol. 702] described in the form of deed hereto annexed marked Exhibit A, and substantially in said form, which is hereby approved by this Court (or, if the Purchasers or the New Company in their stead shall, prior to the execution and delivery of said deed, elect not to take or to accept any part of the property described in said form of deed constituting Exhibit A to this Decree, and shall file with the Receivers written notice of such election, pursuant to the provisions of Article XVI of the Final Decree, then with such changes in said deed in that regard as the Receivers by their execution of said deed shall approve), and the Corporation is directed by way of further assurance to make and deliver similar deed or deeds or other instrument or instruments of conveyance or assignment and transfer to the New Company (or, if the New Company shall so request, to join with the Receivers in the execution and delivery of said deed), or, if the New Company shall so request, separate deeds or other instrument or instruments of conveyance or assignment and transfer in lieu of a single deed, and, if the New Company shall so request, and they be authorized so to do, Robert S. Waters and Robert H. Richards, Jr., as Receivers of and for the Corporation by appointment of the Court of Chancery of the State of Delaware, shall likewise join with the parties first above mentioned in the execution and delivery of said deed; thereby to convey, transfer, assign and release to the New Company the property directed in and by the Final Decree to be conveyed, transferred, assigned and released or quitclaimed by them, respectively; and shall execute and deliver to the New Company any powers [fol. 703] of attorney and authorities appropriate in connection with any instrument of conveyance or assignment and transfer or release. If, prior to the execution and

delivery by the Receivers of the deed or deeds or other instrument or instruments of conveyance or assignment and transfer above mentioned, the New Company shall request that the property described in the form of deed constituting Exhibit A to this Decree, or any part or parts thereof, shall be conveyed or assigned and transferred to any other corporation or corporations, the Receivers are directed to execute and deliver to such other corporation or corporations designated by the New Company a deed or deeds or other instrument or instruments of conveyance or assignment and transfer, in form to be approved by this Court, of such property as the New Company shall by its request designate, and the Corporation is directed by way of further assurance to make and deliver similar deed or deeds or other instrument or instruments of conveyance or assignment and transfer to the grantee or grantees so designated (or, if the New Company shall so request, to join with the Receivers in the execution and delivery of said deed or deeds), together with whatever powers of attorney and authorities are appropriate in connection therewith. If, upon or after the execution and delivery by the Receivers of the deed or deeds above mentioned, the New Company, for the purpose of facilitating the recording thereof in any state or states or in order to comply with any rule of law in any state or states, shall request that any part or parts of the property, described in the form of deed constituting Exhibit A to this Decree and [fol. 704] situated in any such state or states, shall be conveyed, assigned and transferred also by an additional deed or additional deeds relating only to such property, the Receivers are directed to execute and deliver the additional deed or additional deeds so requested of such part or parts of said property, in accordance with such request of the New Company, substantially in the form of said deed constituting Exhibit A to this Decree, and the Corporation is directed also by way of further assurance to make and deliver similar deed or deeds or other instrument or instruments of conveyance or assignment and transfer to the New Company or its grantee or grantees (or, if the New Company shall so request, to join with the Receivers in the execution and delivery of said additional deed or additional deeds), together with whatever powers of attorney and authorities are appropriate in connection therewith.

12. Upon the production of the deed or deeds or other instrument or instruments of conveyance or assignment and transfer by this Decree authorized and directed to be made or of a certified copy or copies thereof, the New Company or other grantee or grantees therein named shall be let into possession of the real estate and plants and property thereby conveyed or assigned and transferred, and the Receivers in this cause shall deliver the same to or upon the order of the New Company or of such grantee or grantees, as the case may be, who shall thereupon hold, possess and enjoy the property so conveyed or assigned and transferred and every part and parcel thereof, free from any lien, charge or claim, except those subject to [fol. 705] which this Decree expressly declares said property to be sold and the obligations which by Section 10 of this Decree the New Company is expressly required to assume and pay, and free from any charge or claim in respect of the Debentures or of the coupons appertaining thereto or in respect of the indebtedness represented thereby or in respect of any other indebtedness of the Corporation and free from all claims, rights, interests or equity of redemption of, in or to the same by or of the Corporation, its successors and assigns, and by or of its creditors or stockholders or by or of any and all persons claiming by, under or through the Corporation, its creditors or stockholders, and by or of all parties to this cause, or any of them.

13. Upon the delivery by the Receivers of the deed or deeds by this Decree authorized and directed to be made, the New Company shall be entitled to have, enjoy and receive all income and revenues of the properties purchased, as well as any and all cash (less the sum of $300,000 to be retained by the Receivers, as specified in Section 43 of Article X of the Final Decree and Section 9 of this Decree) and all current assets, materials and supplies acquired by the Receivers in their operation of such properties, and the Receivers shall forthwith assign, transfer and deliver to the New Company all cash (less the sum of $300,000 aforesaid) and all current assets, materials and supplies at any time acquired by them and then in their possession. The counterpart of said deed or deeds, executed by the New Company and delivered to the Receivers,

shall forthwith be filed by them with the Clerk of this Court.

[fol. 706] 14. Upon the execution and delivery by the Receivers to the New Company of a deed or deeds, substantially in the form of the deed constituting Exhibit A to this Decree, and the execution and delivery by the New Company to said Receivers of a counterpart of said deed, all obligations and liabilities of G. Franklin Ludington and of Carl E. Resley on account of the purchase of the property sold under the Final Decree and of each and every part thereof, or by reason of their successful bid at the sale under the Final Decree or the acceptance of said bid (which obligations and liabilities will have been assumed by the New Company, as in said form of deed provided), shall forthwith cease and determine, and said G. Franklin Ludington and Carl E. Resley, and each of them shall be and are hereby released and discharged from all such obligations and liabilities and, thereupon, without further order of this Court, shall be dismissed as parties to this cause.

15. The Debentures and/or coupons and/or assignments of claims held subject to the order of the Receivers, pursuant to the certificate of interest deposited with the Receivers by the Purchasers G. Franklin Ludington and Carl E. Resley, as stated in the Receivers' Report of Sale, as a pledge that said Purchasers would make good their bid for the property offered for sale, and the Debentures and/or coupons and/or assignments of claims represented by any certificates which may be accepted by the Receivers pursuant to the provisions of Section 8 hereof, shall remain with the banks or trust companies by which such Debentures and/or coupons and/or assignments of claims [fol. 707] are held, subject to said respective certificates, until the further order of this Court.

16. All creditors and stockholders of and claimants against the Corporation, including, but without limiting the generality of the foregoing, all holders of Debentures and coupons and all other creditors and all stockholders of said Corporation and all persons claiming by, through or under said Corporation, are hereby severally and respectively perpetually enjoined from prosecuting against G. Franklin Ludington and Carl E. Resley, or against the

New Company, or against any nominee or assignee or grantee of said G. Franklin Ludington and Carl E. Resley, or of the New Company, or against any other party to this cause, or against any other person or persons, corporation or corporations claiming by, under or through them, or any of them, or against any of the property sold pursuant to the Final Decree, any suit or proceeding arising out of or based on any obligation or liability of the Corporation, or otherwise to impose liability upon said G. Franklin Ludington or Carl E. Resley or upon the New Company or upon any nominee or assignee or grantee of said G. Franklin Ludington and Carl E. Resley or of the New Company or upon any party to this cause or upon any person or persons, corporation or corporations, claiming by, under or through them, or any of them, or upon any property sold pursuant to the Final Decree, in respect of any claim against the Corporation or any claim under or in respect of any Debentures or coupons issued under the Corporation's Indenture dated August 1, 1927, to Bankers Trust Company, as Trustee, or in respect of said Indenture, [fol. 708] or to charge said G. Franklin Ludington or Carl E. Resley or the New Company, or any nominee or assignee or grantee of said G. Franklin Ludington and Carl E. Resley or of the New Company, or any party to this cause, or any person or persons, corporation or corporations, claiming by, under or through them, or any of them, or any property sold pursuant to the Final Decree, with any liability on or in respect of any matter adjudicated by the Final Decree, except pursuant to the provisions of and in subordination to the Final Decree and this Decree; provided, however, that nothing herein contained shall be deemed to limit or restrict (a) the right of any such claimant whose claim, or any part thereof, is payable under the provisions of the Final Decree, as part of the purchase price of the property sold thereunder or out of the proceeds of sale of said property, or any part thereof, to take herein such proceedings in respect thereof as may be authorized or permitted by the Final Decree or by this Decree; or (b) the right of any person, firm or corporation, including the Corporation or its Receivers, to enforce the lien or charge of any lawful mortgage, pledge or other encumbrance, subject to which the property owned by the Corporation and/or its Receivers was sold.

17. As used in this Decree the term "party" to this cause is intended and shall be deemed to mean and include all holders of Debentures or coupons appertaining thereto issued under the Corporation's Indenture dated August 1, 1927, to Bankers Trust Company, Trustee, and also all creditors of said Corporation, whether or not any such creditor shall have filed proof or notice of his claim pur-
[fol. 709] suant to the orders of this Court heretofore made in this cause; and all such Debenture holders, coupon holders and other creditors are by representation parties to this cause and are bound by all the proceedings taken in this cause and each thereof.

Whenever used in this Decree the word "Purchasers" shall be deemed to include their respective heirs, executors, administrators and assigns and the words "New Company" its successors and assigns.

Whenever used in this Decree the word "person" shall be deemed to include the plural as well as the singular number and shall be deemed to include firms, associations and corporations as well as individuals.

18. The Receivers shall report to this Court their acts in carrying out the provisions of this Decree and may apply to this Court for instruction regarding their respective obligations under this Decree, to deliver the deed or deeds by this Decree authorized or to deliver possession of the property conveyed or assigned and transferred or intended to be by said deed or deeds; and all acts of said Receivers in the execution of this Decree shall be subject to supervision and control of this Court. All questions not by the Final Decree or by this Decree disposed of are reserved for future adjudication. Any party to this cause may apply to this Court for further relief with respect to questions not by this Decree or by the Final Decree disposed of.

Dated September 8, 1932.
Per Curiam:

R. M. Gibson, U. S. D. J.

[fol. 710] To which Decree First National Bank of Cincinnati, Ohio, and International Heater Company except and at their instance exception allowed and bill sealed.

R. M. Gibson, District Judge. (Seal.)

IN UNITED STATES DISTRICT COURT

MOTION TO STAY PROCEEDINGS, ORDER, AND EXCEPTION.—Filed Sep. 13, 1932

And now, to-wit, this 13th day of September, 1932, come the First National Bank of Cincinnati, Ohio, by Ehrich, Royall, Wheeler & Walter and Baker & Watts, their counsel, and International Heater Company, of Utica, New York, by Miller & Hubbell and Alter, Wright & Barron, their counsel, interveners, and representing to the court that they have already in the thirteenth objection to confirmation of sale urged this court to postpone and hold in abeyance confirmation of the sale reported by the Receivers, which said objection was overruled by the Court in its order of September 8, 1932, now move the Court to direct said Receivers to refrain from consummating said sale by the delivery of deeds or other instruments of conveyance or assignment until after decision by the Circuit Court of Appeals for the Third Circuit of the appeal already taken, as well as of a further appeal from the order of confirmation which may be taken by the undersigned interveners, or to provide some other method as by the requirement of a bond from the complainants in this case, [fol. 711] whereby the interests of these interveners in and to the assets now within the custody and control of the Court may be fully and completely protected, pending disposition of said appeal or appeals.

First National Bank of Cincinnati, Ohio, by Ehrich, Royall, Wheeler & Walter, Baker & Watts, Their Counsel. Sidney J. Watts, of Counsel. International Heater Company, by Miller & Hubbell. Alter, Wright & Barron, Their Counsel. Gifford Wright of Counsel.

Order

And now, to-wit, this 13th day of September, 1932, the foregoing Motion being presented in open court, upon consideration thereof it is ordered that the same be and it is hereby refused.

Per Curiam.

G.

Exception

To which action of the Court said moving parties except and at their instance exception is allowed and bill sealed.

R. M. Gibson, P. J. (Seal.)

[fol. 712] In United States District Court

Petition for Appeal—Filed Sep. 30, 1932

First National Bank of Cincinnati and International Heater Company, intervening defendants in the above entitled action, believing themselves to be aggrieved by the order and decree made and entered on the 8th day of September, 1932, in the above entitled cause, do hereby jointly and severally appeal therefrom to the Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignments of error which are filed herein, and pray that this appeal may be allowed, that a citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order and decree were made, be duly authenticated and sent to the Circuit Court of Appeals for the Third Circuit, and the aforesaid petitioners and each of them pray that a proper order as to the security to be required to perfect this appeal be made, and for all general and equitable relief.

Dated Pittsburgh, Pennsylvania, September 30, 1932.

First National Bank of Cincinnati, International Heater Company, Petitioners, by Baker & Watts, Alter, Wright & Barron, Their Counsel.

[fol. 713] In United States District Court

Assignments of Error—Filed Sep. 30 1932

(On Appeal from Decree of September 8, 1932)

I

The District Court erred in making and entering the decree confirming sale and approving the Plan of Reorganization and Deed, dated September 8, 1932, to which excep-

tions have been duly noted in behalf of the appellants herein, said decree and the said exceptions being made part hereof by reference thereto as the same appear in the record of this case.

II

Appellants renew here their assignments of error numbered II to XXVI, both inclusive, heretofore filed herein as part of their petition for appeal from the final order of sale entered May 21, 1932, and by reference thereto make the same a part of these assignments of error.

III

The court erred in overruling appellants' objection that the price bid by the purchasers at the sale, confirmed by said decree of September 8, 1932, is grossly inadequate.

IV

The court erred in overruling appellants' objection that said sale was conducted without appraisal, and without other adequate or suitable steps having been taken properly to inform the Court as to the fair and just value of the assets of the defendant corporation or as to the best [fol. 714] manner of realizing on the same for the benefit of creditors.

V

The court erred in overruling appellants' objection that the decree of sale of May 31, 1932, was so framed or designed as to exclude, rather than to bring about, competitive bidding, and that said sale was actually conducted without competitive bidding.

VI

The court erred particularly in that portion of said decree of September 8, 1932, namely, paragraph sixth thereof, which approves the plan and agreement of reorganization in so far as it affects the respective priority of all persons and corporations interested in the National Radiator Corporation and its property. The said plan is discriminatory, in that it contemplates and makes provision for the payment of some unpreferred and unsecured gen-

eral creditors in cash in full, while contemplating and providing that others of such unpreferred and unsecured general creditors shall receive a dividend in cash, constituting but a small percentage of the face of their claims, or be relegated merely to the acceptance of the securities offered by the committee.

VII

The District Court erred in confirming said decree of sale, in that it did not require proper notice to be given to creditors before directing said sale and in that no notice was in fact given to certain creditors, including International Heater Company, and that they had no opportunity [fol. 715] to oppose the application for a sale or the terms thereof, or to introduce any evidence to the effect that no such sale should be made.

Wherefore, and in order that the foregoing assignments of error may be and appear of record in this cause, said intervening defendants jointly and severally present the same to this Court and jointly and severally pray that disposition may be made thereof in accordance with law and the statutes of the United States in such case made and provided; and said intervening defendants jointly and severally further pray that the decree confirming the sale of the properties and assets of the defendant corporation, entered September 8, 1932, be reversed and that a decree be entered in accordance with and for the protection of the rights of these said intervening defendants and as may be for the best interest and protection of all creditors of said defendant corporation.

Dated September 30, 1932.

Baker & Watts, Alter, Wright & Barron, Solicitors for said Intervening Defendants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

And now, to wit, this 30th day of September, 1932, appeal allowed, citation awarded and appellants directed to file bond in the sum of $1,000.00, conditioned upon payment of costs of appeal.

R. M. Gibson, District Judge.

[fol. 716] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO PRINTING OF RECORD—Filed Oct. 20, 1932

It is stipulated that the following shall constitute the printed transcript of Record on Appeal; also that on argument any original papers not printed in full may be produced in court and referred to by either side:

(1) Docket entries.

(2) Bill of Complaint; the following portion of "Schedule A," to wit, the first or title page; pages 1 to middle of page 8; Title of Article I, page 8, and sections 1 and 6 thereof in full; Title only of Article II, page 14; Titles only of Articles III, page 31, IV, page 42, all of Article V, beginning with page 52 and ending with section 9 on page 60; Titles only of Article VI, page 60, VII, page 61, VIII, page 62, IX, page 68; all of article X, page 69, including sections 1 and 2; Title only of Article XI, page 71; then words "Signatures and acknowledgments"; also Schedule B in full.

(3) Answer of National Radiator Corporation filed October 9, 1931.

(4) Decree appointing receivers.

(5) Petition of Bankers Trust Company, Consent of Defendant and Order of Court, filed October 13, 1932.

(6) Petition and order, filed October 23, 1931, fixing time for filing claims.

[fol. 717] (7) Petition of Bankers Trust Company for leave to bring suit and Order of Court, filed December 30, 1931.

(8) First Report of Receivers, filed January 2, 1932, the first six pages thereof (without the annexed inventory).

(9) Intervening Petition of Bankers Trust Company.

(10) Petition of Bankers Trust Company for leave to intervene. Order thereon.

(11) Answer of defendant, filed February 13, 1932.

(12) Petition of First National Bank of Cincinnati, filed February 17, 1932.

(13) Answer of Bankers Trust Company, filed March 1, 1932.

(14) Answer of complainants, filed March 2, 1932.

(15) Order of Court of March 3, 1932, allowing intervention of First National Bank of Cincinnati.

(16) Testimony of William C. Myers, Harold F. Linder and Carl E. Resley, filed March 3, 1932.

(17) Petition of International Heater Company for leave to intervene and Order.

(18) Transcript of testimony, filed June 1, 1932.

(19) Opinion of Judge Gibson, filed May 31, 1932.

(20) Final Decree of Sale, dated May 31, 1932, but omitting "Schedule A" and substituting therefor a summary comprising the headings of clauses I to X, inserting [fol. 718] after each clause a reference to the corresponding lettered parcel in Schedule B.

(21) Receivers' Supplemental Schedule, filed June 11, 1932.

(22) Petition for appeal and Assignments of Error, filed July 23, 1932.

(23) The following is printed by agreement:

"On July 28, 1932, the Receivers filed Statement pursuant to Section 54, Article XV, of the Final Decree of Sale. Sidney J. Watts, of Counsel for Appellant. Maynard Teall, of Counsel for Appellee."

(24) Petition for approval of plan, filed July 29, 1932, in full, including exhibits and schedules.

(25) Receivers' Report of Sale, but omitting all three Schedules.

(26) Petition of National Radiator Corporation, a Maryland corporation, for confirmation of sale, filed August 17, 1932.

(27) Petition of Resley and Ludington for confirmation of sale, filed August 17, 1932.

(28) Answer of First National Bank of Cincinnati and International Heater Company, filed August 17, 1932.

(29) Objections to Receivers' Report of Sale, filed August 17, 1932.

[fol. 719] (30) Supplemental objection to plan of reorganization, filed August 19, 1932.

(31) Transcript of testimony, filed September 8, 1932.

(32) Memorandum of Judge Gibson, filed September 8, 1932.

(33) Decree confirming sale, filed September 8, 1932, but only the first fifteen pages thereof, omitting Exhibit "A".

(34) Motion for Stay and Order thereon, filed September 13, 1932.

(35) Petition for appeal and Assignments of Error, filed September 30, 1932, by First National Bank of Cincinnati and International Heater Company.

(36) This Stipulation as to Contents of Record.

Sidney J. Watts, Baker & Watts, Attorneys for Appellants. Maynard Teall, Reed, Smith, Shaw & McClay, Attorneys for Receivers and of Counsel for Complainants.

[fols. 720 & 720½] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 721] Pages 1 to 720, inclusive, of this record are contained in the Consolidated Record filed in this cause in the appeals by First National Bank of Cincinnati and International Heater Company, now pending in this Court at Nos. 4959 and 5020, which Consolidated Record has, by stipulation herein (R. 790), been made a part of this record.

In United States District Court, Western District of Pennsylvania

Additional Docket Entries

Nov. 4, 1932.—On petition of Edward J. Ramsey, Order entered allowing appeal.

Nov. 4, 1932.—On petition of Josephine Ramsey and Amy Arzt, Order entered allowing appeal.

Nov. 4, 1932.—Exception to Decree of Sale filed by Josephine Ramsey, Edward J. Ramsey and Amy Arzt, filed by leave of Court.

Nov. 4, 1932.—Assignments of Error filed by Edward J. Ramsey.

Nov. 4, 1932.—Assignments of Error filed by Josephine Ramsey and Amy Arzt.

Nov. 4, 1932.—Citation issued returnable Dec. 3, 1932.

Nov. 4, 1932, Citation issued returnable Dec. 3, 1922.

Nov. 17, 1932.—Appeal Bond of Josephine Ramsey and Amy Arzt filed and approved.

Nov. 17, 1932.—Appeal Bond of Edward J. Ramsey approved and filed.

[fol. 722] Nov. 21, 1932.—Stipulation in re Record on appeals by Josephine Ramsey, Amy Arzt and Edward J. Ramsey, filed.

In United States District Court

Petition of Josephine Ramsey in Opposition to Confirmation of Sale of Assets by Receivers—Filed Aug. 17, 1932

To the Honorable the Judges of said Court:

The petition of Josephine Ramsey, in behalf of herself and in behalf of all other debenture-holders of the National Radiator Corporation who are opposed to and who refuse to accept the Plan and Agreement dated February 11, 1931, for the reorganization of the National Radiator Corporation, respectfully represents:

1. That she is the holder of fifty thousand dollars principal amount Six and One-half Percent Sinking Fund Gold Debentures of the National Radiator Corporation, to all

of which are attached the February 1st, 1931 and all subsequent interest coupons.

2. That she respectfully appears herein to oppose the confirmation of the sale insofar as the same affects her as a holder of debentures who has not assented to the Plan of Reorganization of the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of the National Radiator Corporation, on the ground that this court is and was without jurisdiction to appoint receivers of said corporation, order [fol. 723] the sale of its assets and direct the payment to non-assenting bondholders their aliquot share of the forced sale value realized upon the sale of said assets.

3. That your petitioner also respectfully represents to this court, upon information and belief, that the suit was improperly and collusively made and joined by the parties thereto for the purpose of creating an alleged cause cognizable by a Federal court of equity, in violation of Section 37 of the U. S. Judicial Code, as follows:

(a) That prior to the 1st day of February, 1931, when an installment of interest became due under the Debenture described in the complaint herein, the National Radiator Corporation conceived the plan to reorganize for the purpose of reducing and scaling its funded debt.

(b) That pursuant to said plan, a Reorganization Committee, composed of the complainants Rudolph B. Flershem; Charles O. Cornell and John H. Waters, was appointed by the defendant, National Radiator Corporation, as its agent to effect said reorganization.

(c) That John H. Waters is, and at all the times stated herein was, the President and a director of said National Radiator Corporation, and Rudolph B. Flershem is, and at all the times stated herein was, an officer and director of said corporation.

(d) That pursuant to said plan, the National Radiator [fol. 724] Corporation defaulted in the payment of interest on the 1st day of February, 1931, and shortly thereafter through the Reorganization Committee submitted the plan of reorganization which is set forth in Schedule B annexed to the complaint.

(e) That on or about the 16th day of September, 1931, said Reorganization Committee declared said plan operative and in full force and effect and that thereafter, on or about the 17th day of September, 1931, pursuant to agreement theretofore made with the Bondholders' Protective Committee, the complainant, Frank B. Cahn, a member thereof, was elected a member of the Reorganization Committee.

(f) That in and by said plan, the Reorganization Committee and all the bondholders who had deposited their bonds under said Plan and Agreement, had agreed, with the National Radiator Corporation to the organization of a new company to which should be transferred the assets of the National Radiator Corporation, and had agreed to accept in payment for their claims, arising out of the debentures and unpaid and accrued interest, securities of said new corporation in full payment and discharge for said debentures and accrued interest.

(g) That the Bankers Trust Company had knowledge of and actively participated in the plans and all proceedings for the reorganization of said National Radiator Cor-
[fol. 725] poration, and at all times acted in collusion with the other parties to this cause.

(h) That by reason of the foregoing premises, there was no controversy existing between the parties to said suit at the time of the filing of the bill of complaint herein and the entry of the decree upon said bill and answer of the defendant, National Radiator Corporation.

4. That your petitioner further objects to the confirmation of the sale and to the decree entered and filed herein on May 31st, 1932, insofar as the same affects and applies to her as a non-assenting bondholder, on the ground that the plan is unfair and inequitable insofar as it permits the preferred stockholders of the National Radiator Corporation to share in any of the stock to be issued by the new corporation pursuant to the plan described in the complaint.

5. That the plan is unfair, unjust and inequitable because it does not provide for adequate compensation to non-assenting bondholders who are entitled to receive in cash the principal amount of the bonds together with the redemption

premium provided in the Indenture and also accrued interest upon said bonds to date of payment.

6. That the plan is unfair, unjust and inequitable because it provides for payment in full of all liabilities of the National Radiator Corporation for services and merchandise which have not been paid at the time of the acquisition by [fol. 726] the new corporation of the assets and business of said National Radiator Corporation.

7. That the plan is unfair, unjust and inequitable because it provides for the issuance to preferred stockholders of common stock in the new company share for share without the payment of additional cash in consideration therefor.

8. That your petitioner, by appearing herein in opposition to the confirmation of the sale and to the aforesaid decree insofar as it applies to non-assenting bondholders, does not waive any objections to the jurisdiction of this court and hereby reserves any and all objections and exceptions to this court's exercise of jurisdiction in this cause, insofar as it applies to non-assenting bondholders.

Wherefore your petitioner respectfully prays that the sale be not confirmed and that the decree entered herein on the 31st day of May, 1932, be set aside and vacated as against your petitioner and the non-assenting holders of debentures of the National Radiator Corporation.

Dated New York, August 16th, 1932.

Josephine Ramsey. Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Petitioner.

[fol. 727] *Duly sworn to by Josephine Ramsey. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

PETITION OF AMY ARZT IN OPPOSITION TO CONFIRMATION OF SALE OF ASSETS BY RECEIVERS—Filed Aug. 17, 1932

To the Honorable the Judges of said Court:

The petition of Amy Arzt, in behalf of herself and in behalf of all other debenture-holders of the National Radi- [fol. 728] ator Corporation who are opposed to and who

refuse to accept the Plan and Agreement dated February 11, 1931, for the reorganization of the National Radiator Corporation, respectfully represents:

1. That she is the holder of seventy-one thousand dollars principal amount Six and One-half per cent Sinking Fund Gold Debentures of the National Radiator Corporation, to twenty-four of which are attached the August 1st, 1931, and all subsequent interest coupons, and to forty-seven of which are attached the February 1st, 1931, and all subsequent interest coupons.

2. That she respectfully appears herein to oppose the confirmation of the sale insofar as the same affects her as a holder of debentures who has not assented to the Plan of Reorganization of the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of the National Radiator Corporation, on the ground that this court is and was without jurisdiction to appoint receivers of said corporation, order the sale of is assets and direct the payment to non-assenting bondholders their aliquot share of the forced sale value realized upon the sale of said assets.

3. That your petitioner also respectfully represents to this court, upon information and belief, that the suit was improperly and collusively made and joined by the parties thereto for the purpose of creating an alleged cause cogniz- [fol. 729] able by a Federal court of equity, in violation of Section 37 of the U. S. Judicial Code, as follows:

(a) That prior to the 1st day of February, 1931, when an installment of interest became due under the Debenture described in the complaint herein, the National Radiator Corporation conceived the plan to reorganize for the purpose of reducing and sealing its funded debt.

(b) That pursuant to said plan, a Reorganization Committee, composed of the complainants Rudolph B. Flershem, Charles O. Cornell and John H. Waters, was appointed by the defendant, National Radiator Corporation, as its agent to effect said reorganization.

(c) That John H. Waters is, and at all the times stated herein was, the President and a director of said National Radiator Corporations, and Rudolph B. Flershem is, and

at all the times stated herein was, an officer and director of said corporation.

(d) That pursuant to said plan, the National Radiator Corporation defaulted in the payment of interest on the 1st day of February, 1931, and shortly thereafter through the Reorganization Committee submitted the plan of reorganization which is set forth in Schedule B annexed to the complaint.

(e) That on or about the 16th day of September, 1931, said Reorganization Committee declared said plan operative and in full force and effect and that thereafter, on or [fol. 730] about the 17th day of September, 1931, pursuant to agreement theretofore made with the Bondholders' Protective Committee, the complainant, Frank B. Cahn, a member thereof, was elected a member of the Reorganization Committee.

(f) That in and by said plan, the Reorganization Committee and all the bondholders who had deposited their bonds under said Plan and Agreement, had agreed, with the National Radiator Corporation, to the organization of a new company to which should be transferred the assets of the National Radiator Corporation, and had agreed to accept in payment for their claims, arising out of the debentures and unpaid and accrued interest, securities of said new corporation in full payment and discharge for said debentures and accrued interest.

(g) That the Bankers Trust Company had knowledge of and actively participated in the plans and all proceedings for the reorganization of said National Radiator Corporation, and at all times acted in collusion with the other parties to this cause.

(h) That by reason of the foregoing premises, there was no controversy existing between the parties to said suit at the time of the filing of the bill of complaint herein and the entry of the decree upon said bill and answer of the defendant, National Radiator Corporation.

4. That your petitioner further objects to the confirmation of the sale and to the decree entered and filed herein [fol. 731] on May 31st, 1932, insofar as the same effects and applies to her as a non-assenting bondholder, on the

ground that the plan is unfair and inequitable insofar as it permits the preferred stockholders of the National Radiator Corporation to share in any of the stock to be issued by the new corporation pursuant to the plan described in the complaint.

5. That the plan is unfair, unjust and inequitable because it does not provide for adequate compensation to non-assenting bondholders who are entitled to receive in cash the principal amount of the bonds together with the redemption premium provided in the Indenture and also accrued interest upon said bonds to date of payment.

6. That your petitioner, by appearing herein in opposition to the confirmation of the sale and to the aforesaid decree insofar as it applies to non-assenting bondholders, does not waive any objections to the jurisdiction of this court and hereby reserves any and all objections and exceptions to this court's exercise of jurisdiction in this cause, insofar as it applies to non-assenting bondholders.

7. That the plan is unfair, unjust and inequitable because it provides for payment in full of all liabilities of the National Radiator Corporation for services and merchandise which have not been paid at the time of the acquisition by the new corporation of the assets and business of said National Radiator Corporation.

[fol. 732] 8. That the plan is unfair, unjust and inequitable because it provides for the issuance to preferred stockholders of common stock in the new company share for share without the payment of additional cash in consideration therefor.

Wherefore your petitioner respectfully prays that the sale be not confirmed and that the decree entered herein on the 31st day of May, 1932, be set aside and vacated as against your petitioner and the non-assenting holders of debentures of the National Radiator Corporation.

Dated New York, August 15th, 1932.

Amy Arzt. Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Petitioner.

Duly sworn to by Amy Arzt. Jurat omitted in printing.

[fol. 733] IN UNITED STATES DISTRICT COURT

PETITION OF EDWARD J. RAMSEY IN OPPOSITION TO CONFIRMATION OF SALE OF ASSETS BY RECEIVERS—Filed Aug. 17, 1932

To the Honorable the Judges of said Court:

The petition of Edward J. Ramsey, in behalf of himself and all other preferred stockholders of the National Radiator Corporation who are opposed to and who refuse to accept the Plan and Agreement dated February 11, 1931, for the reorganization of the National Radiator Corporation, respectfully represents:

1. That he is the holder of five hundred shares of preferred stock of the National Radiator Corporation.

2. That he respectfully appears herein to oppose the confirmation of the sale insofar as the same affects him as a holder of preferred stock who has not assented to the Plan of Reorganization of the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of the National Radiator Corporation, on the ground that this court is and was [fol. 734] without jurisdiction to appoint receivers of said corporation and order the sale of its assets.

3. That your petitioner also respectfully represents to this court, upon information and belief, that the suit was improperly and collusively made and joined by the parties thereto for the purpose of creating an alleged cause cognizable by a Federal court of equity, in violation of Section 37 of the U. S. Judicial Code, as follows:

(a) That prior to the 1st day of February, 1931, when an installment of interest became due under the Debenture described in the complaint herein, the National Radiator Corporation conceived the plan to reorganize for the purpose of reducing and scaling its funded debt.

(b) That pursuant to said plan, a Reorganization Committee, composed of the complainants Rudolph B. Flershem, Charles O. Cornell and John H. Waters, was appointed by the defendant, National Radiator Corporation, as its agent to effect said reorganization.

(c) That John H. Waters is, and at all the times stated herein was, the President and a director of said National Radiator Corporation, and Rudolph B. Flershem is, and at all the times stated herein was, an officer and director of said corporation.

(d) That pursuant to said plan, the National Radiator Corporation defaulted in the payment of interest on the [fol. 735] 1st day of February, 1931, and shortly thereafter through the Reorganization Committee submitted the plan of reorganization which is set forth in Schedule B annexed to the complaint.

(e) That on or about the 16th day of September, 1931, said Reorganization Committee declared said plan operative and in full force and effect and that thereafter, on or about the 17th day of September, 1931, pursuant to agreement theretofore made with the Bondholders' Protective Committee, the complainant, Frank B. Cahn, a member thereof, was elected a member of the Reorganization Committee.

(f) That in and by said plan, the Reorganization Committee and all the bondholders who had deposited their bonds under said Plan and Agreement, had agreed, with the National Radiator Corporation, to the organization of a new company to which should be transferred the assets of the National Radiator Corporation, and had agreed to accept in payment for their claims, arising out of the debentures and unpaid and accrued interest, securities of said new corporation in full payment and discharge for said debentures and accrued interest.

(g) That the Bankers Trust Company had knowledge of and actively participated in the plans and all proceedings for the reorganization of said National Radiator Corpora- [fol. 736] tion, and at all times acted in collusion with the other parties to this cause.

(h) That by reason of the foregoing premises, there was no controversy existing between the parties to said suit at the time of the filing of the bill of complaint herein and the entry of the decree upon said bill and answer of the defendant, National Radiator Corporation.

4. That the plan is unfair, unjust and inequitable because it does not provide for any compensation in cash to non-

assenting preferred stockholders who, pursuant to the statutes of the State of Delaware, in which State the National Radiator Corporation was incorporated, are entitled to compensation in cash upon the reorganization of a corporation organized in said State and the transfer of its assets to a new corporation.

5. That your petitioner, by appearing herein in opposition to the confirmation of the sale and to the aforesaid decree insofar as it applies to non-assenting preferred stockholders, does not waive any objections to the jurisdiction of this court and hereby reserves any and all objections and exceptions to this court's exercise of jurisdiction in this cause, insofar as it applies to non-assenting preferred stockholders.

Wherefore your petitioner respectfully prays that the sale be not confirmed and that the decree entered herein on the 31st day of May, 1932, be set aside and vacated as [fol. 737] against your petitioner and the non-assenting preferred stockholders of the National Radiator Corporation.

Dated New York, August 16th, 1932.

Edward J. Ramsey. Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Petitioner.

Duly sworn to by Edward J. Ramsey. Jurat omitted in printing.

[fol. 738] In United States District Court

Exception to Decree—Filed Nov. 4, 1932

And now, to wit, November 4th, 1932, upon request of counsel for Josephine Ramsey, Edward J. Ramsey and Amy Arzt, an exception is noted to each of said persons to the Decree Confirming Sale and Approving Deed entered on September 8th, 1932, and bill sealed.

R. M. Gibson, District Judge. (Seal.)

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF JOSEPHINE RAMSEY AND AMY ARZT —Filed Nov. 4, 1932

To the Honorable the Judges of said Court:

Josephine Ramsey and Amy Artz, holders of debentures of National Radiator Corporation, defendant above named, who have refused to accept the Plan and Agreement dated February 11th, 1931, for the reorganization of the said National Radiator Corporation and who have appeared in this suit in opposition to the confirmation of the sale of the assets of the defendant corporation, conceiving themselves aggrieved by the Decree Confirming Sale and Approving Deed made and entered in the above entitled case on the 8th day of September, 1932, hereby jointly and severally appeal therefrom to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the Assignments of Error filed herewith, and petitioners pray that this appeal may be allowed; that a citation be is- [fol. 739] sued as provided by law; that a transcript of the record, proceedings and papers upon which said decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit; and that an order be made fixing the amount of the cost bond which petitioners shall file upon said appeal.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Petitioners.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Now, to wit, November 4th, 1932, the foregoing petition of Josephine E. Ramsey and Amy Arzt having been presented in open court, and it appearing to the court that the petitioners have filed their Assignments of Error, it is ordered and decreed that an appeal be, and the same hereby is, allowed the petitioners, jointly and severally, to the United States Circuit Court of Appeals for the Third Circuit from the decree entered in the above entitled case on September 8th, 1932; that a citation be issued as provided

by law; that a transcript of the record, proceedings and papers upon which said decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit; and that an appeal bond for costs be given in the sum of $500.00.

R. M. Gibson, District Judge.

[fol. 740] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Nov. 4, 1932

Now come Josephine Ramsey and Amy Arzt, by their solicitors, and having jointly and severally prayed an appeal from the Decree Confirming Sale and Approving Deed entered in this cause on September 8th, 1932, respectfully show that the said decree is erroneous, and should be reversed and set aside, for the following reasons:

1. The District Court erred in making and entering the Decree Confirming Sale and Approving Deed dated September 8th, 1932, to which exceptions have been duly noted in behalf of the appellants herein, the said decree and the said exceptions being made part hereof by reference thereto as the same appear in the record of this case.

2. The District Court erred in approving and confirming the receivers' sale of the assets of the defendant corporation.

3. The District Court erred in overruling appellants' objection to the confirmation of said sale, insofar as the same affects appellants as holders of debentures of the defendant corporation who have not assented to the said Plan and Agreement for the reorganization of the defendant corporation, which objection was based on the ground that the said District Court is and was without jurisdiction to appoint receivers for the defendant corporation or to order the sale of its assets or to order the payment to non-assent-
[fol. 741] ing bondholders of their aliquot share of the forced sale value realized upon such sale.

4. The District Court erred in overruling appellants' objection to the confirmation of said sale, based upon the ground that this suit was improperly and collusively made

and joined by the parties thereto for the purpose of creating an alleged cause cognizable by a Federal court of equity, in violation of Section 37 of the United States Judicial Code.

5. The District Court erred in holding that the provisions of the Plan and Agreement dated February 11th, 1931, for the reorganization of the defendant corporation are equitable and fair, and in overruling appellants' objections to the said Plan and Agreement.

Wherefore, and in order that the foregoing Assignments of Error may be and appear of record in this case, the appellants herein present the same to this court and pray that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided; and appellants further pray that said final decree may be reversed and vacated and the District Court be directed to enter such decree in this cause, consistent with appellants' rights, as the United States Circuit Court of Appeals for the Third Circuit shall deem just.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Appellants.

[fol. 742] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF EDWARD J. RAMSEY—Filed Nov. 4, 1932

To the Honorable the Judges of said Court:

Edward J. Ramsey, a holder of preferred stock of National Radiator Corporation, defendant above named, who has refused to accept the Plan and Agreement dated February 11th, 1931, for the reorganization of the said National Radiator Corporation and who has appeared in this suit in opposition to the confirmation of the sale of the assets of the defendant corporation, conceiving himself aggrieved by the Decree Confirming Sale and Approving Deed made and entered in the above entitled case on the 8th day of September, 1932, hereby appeals therefrom to the United States Circuit Court of Appeals for the Third

Circuit for the reasons specified in the Assignments of Error filed herewith, and petitioner prays that this appeal may be allowed; that a citation be issued as provided by law; that a transcript of the record, proceedings and papers upon which said decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit; and that an order be made fixing the amount of the cost bond which petitioner shall file upon said appeal.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Petitioner.

[fol. 743] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Now, to-wit, November 4th, 1932, the foregoing petition of Edward J. Ramsey having been presented in open court, and it appearing to the court that the petitioner has filed his Assignments of Error, it is Ordered and Decreed that an appeal be, and the same hereby is, allowed the petitioner to the United States Circuit Court of Appeals for the Third Circuit from the decree entered in the above entitled case on September 8th, 1932; that a citation be issued as provided by law; that a transcript of the record, proceedings and papers upon which said decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit; and that an appeal bond for costs be given in the sum of $500.00.

R. M. Gibson, District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Nov. 4, 1932

Now comes Edward J. Ramsey, by his solicitors, and having prayed an appeal from the Decree Confirming Sale and Approving Deed entered in this cause on September 8th, 1932, respectfully shows that the said decree is erroneous, and should be reversed and set aside, for the following reasons:

1. The District Court erred in making and entering the Decree Confirming Sale and Approving Deed dated September 8th, 1932, to which exceptions have been duly noted, in behalf of the appellant herein, the said decree and the [fol. 744] said exception being made part hereof by reference thereto as the same appear in the record of this case.

2. The District Court erred in approving and confirming the receivers' sale of the assets of the defendant corporation.

3. The District Court erred in overruling appellant's objection to the confirmation of said sale, insofar as the same affects appellant as a holder of preferred stock of the defendant corporation who has not assented to the said Plan and Agreement for the reorganization of the defendant corporation, which objection was based on the ground that the said District Court is and was without jurisdiction to appoint receivers for the defendant corporation or to order the sale of its assets.

4. The District Court erred in overruling appellant's objection to the confirmation of said sale, based upon the ground that this suit was improperly and collusively made and joined by the parties thereto for the purpose of creating an alleged caused cognizable by a Federal court of equity, in violation of Section 37 of the United States Judicial Code.

5. The District Court erred in holding that the provisions of the Plan and Agreement dated February 11th, 1931, for the reorganization of the defendant corporation are equitable and fair, and in overruling appellant's objection to the said Plan and Agreement.

[fol. 745] Wherefore, and in order that the foregoing Assignments of Error may be and appear of record in this case, the appellant herein presents the same to this court and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided; and appellant further prays that said final decree may be reversed and vacated and the District Court be directed to enter such decree in this cause, consistent with appellant's rights, as the

United States Circuit Court of Appeals for the Third Circuit shall deem just.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Appellant.

[fol. 746] EXHIBIT No. 2—ARTZ & RAMSEY

National Radiator Corp.

11/6/31.

Earnings (Consolidated)—12 Months Ended Sept. 30

	1931	1930
Oper. income	d$29,146	$308,950
Depreciation	490,190	469,699
Net oper. loss	519,336	160,749
Other income	52,281	73,195
Total loss	467,055	87,554
Res. for bad debts	52,313	117,649
Other deductions	281,876	239,662
Bal. for interest	d801,244	d444,866
Interest	697,157	721,948
Times earned	d1.15	d0.62
Net deficit	1,498,401	1,166,814
Earn. on preferred	d25.55	d19.86
Earn. on common	d7.00	d5.79

Comparative Consolidated Balance Sheet as of Sept. 30

Assets:	1931	1930
Property (less depr.)	$6,753,170	$7,141,849
Good-will, pats., etc	6,534,502	6,634,502
Special deposits	16,293	38,446
Investments, etc	542,590	674,655
Defd. charges	234,096	161,586
Current Assets:		
Cash	1,233,465	1,205,696
Receivables (net)	1,092,329	1,182,369
Inventories	2,112,031	2,665,665
Total curr. assets	4,437,825	5,053,730
Total assets	18,618,476	19,704,768

Liabilities:		
*Capital stock	10,000,000	10,000,000
Funded debt	10,707,000	10,841,000
Res. for depos. on prop., etc.	79,299	119,059
P. & L. deficit	3,202,823	1,590,753
Current Liabilities:		
Accounts pay	54,992	78,325
Prov. for taxes, etc.	168,060	139,621
Accrued interest	811,948	117,516
Total curr. liab	1,035,000	335,462
Total Liabilities	18,618,476	19,704,768
Working Capital	3,402,825	4,718,268
Ratio C. A. to C. L.	4.29 to 1	15.06 to 1
Equity per share pfd	4.48	32.24

*Represented by 58,646 no par preferred and 272,708 no par common shares in 1931 and 58,746 no par preferred and 272,508 no par common shares in 1930.

[fol. 747] EXHIBIT No. 4—ARTZ & RAMSEY

Adjourned Meeting of the Board of Directors Held at Johnstown, Pa., January 31, 1931

Called to Order:

Meeting was called to order at 2:00 o'clock P. M., Eastern Standard Time, at the office of the Corporation at 221 Central Avenue, Johnstown, Pennsylvania.

Attendance:

Present: Charles L. Crouse, Harry S. Endsley, Carl E. Resley, George O. Suppes, John H. Waters, Robert S. Waters, Samuel B. Waters, (7, same being a quorum).

Absent: Herman E. Baumer, Andrew B. Crichton, Rudolph B. Flershem, John Price Jones, John W. Watson (5).

John H. Waters presided and Carl E. Resley acted as Secretary.

Notice of Meeting:

The Secretary reported that this was an adjourned meeting of the one held January 28, 1931 and was called at the direction of the Chairman of the Board.

[fol. 748] Approval of Minutes:

Minutes of the Board of Directors' meeting held on January 28, 1931, were read and approved as read. Due to press of other matters, the minutes of Board meetings held on March 11, 1930 and April 12, 1930 were not read and approved; such action being deferred to a later meeting.

Debenture Interest Due February 1, 1931:

The Chairman stated that the meeting had been called for the purpose of taking formal action with respect to the payment of the interest due on February 1, 1931 on the Corporation's outstanding 6½% Sinking Fund Gold Debentures, a matter which had been the subject of serious consideration by the Directors and the Executive Committee for the past several months. In this connection, the Chairman submitted to the Board a tentative balance sheet of the Company as of December 31, 1930. The Chairman pointed out that, although the cash working capital of the Company as shown by the balance sheet was reasonably ample, it was evident that, if the Company were to do an increasing volume of business, it would require the use of all or a substantial part of this cash to carry larger inventories and receivables, and that it would also be necessary to make large expenditures for the design of new products and for equipment necessary in their manufacture. Otherwise, the Chairman pointed out it might well prove to be impossible to maintain the Company's competitive business as against other enterprises in the industry. The Chairman then referred to the fact that the management had considered the [fol. 749] advisability of a reorganization and had requested Messrs. Rudolph B. Flershem, Charles O. Cornell and John H. Waters to act as a Committee to consider the matter and to formulate a Plan of Reorganization which might be submitted to the security holders of the Company. The Chairman reported that this Committee was now considering the matter of reorganization and had formed the opinion that a reorganization was advisable. The Board

then proceeded to discuss at length the question as to whether it was advisable to pay the interest due on February 1, 1931 on the Corporation's Debentures.

In the course of the discussion, it was expressed as the view of all the Directors present that the continuation of the business operations of the Company required the conservation at this time of the cash resources of the Company, particularly as the outlook for the immediate future was obscure, and that, in view of general business conditions, it was not possible to forecast with any assurance an early recovery in the earning power of the Company. It was also expressed as the opinion of all the Directors that a liquidation of the Company under present conditions would be most unfortunate, as it would result in only a very small payment to Debenture holders and other creditors, and would leave nothing for the stockholders of the Company.

At the close of the discussion on motion duly made and seconded, the following preamble and resolutions were unanimously adopted by the affirmative vote of every Director present at the meeting:

[fol. 750] Whereas, in the opinion of this Board of Directors, the continuance of the business operations of this Company requires the conversation at this time of its cash resources; and

Whereas, it is further the opinion of this Board of Directors, that, to avoid a liquidation, it is advisable and for the best interests of its security holders, that this Company be reorganized with all possible expedition, upon a basis which will provide a revised capital structure with drastically reduced fixed charges and which will permit the employment of the liquid assets of the Company in the current conduct of its business;

Resolved, that it is the considered opinion and judgment of the Board of Directors of this Company that it should, for the reasons hereinabove recited, omit the payment of the interest due on February 1, 1931, upon its outstanding 6½% Sinking Fund Gold Debentures, and, accordingly the Officers of this Company are hereby directed to omit the payment of such interest;

Further Resolved, that this Board of Directors hereby ratifies, confirms and approves the action of the management of the Company in requesting Messrs. Rudolph B. Flershem, Charles O. Cornell and John H. Waters to act as

a Reorganization Committtee to formulate and submit to the security holders a Plan of Reorganization of the character aforesaid.

Further Resolved, that, when and if said Plan of Reorganization shall be formulated by said Committee, all expenses of every nature whatsoever incurred by the Re- [fol. 751] organization Committee pursuant to or under the terms and provisions of said Plan, and the compensation of said Committee for services thereunder, shall be paid by this Company, and the proper Officers of this Company are hereby authorized to deliver to said Reorganization Committee an undertaking to that effect and to make payments accordingly for any and all such expenses upon receipt of bills and/or vouchers properly approved by the Reorganization Committee.

Adjournment:

No further business being presented, the meeting adjourned at 3:15 o'clock P. M., Eastern Standard Time.

(Signed) Carl E. Resley, Secretary.

EXHIBIT No. 5—ARTZ & RAMSEY

(To be written by Mr. Erpf)

March —, 1931.

Re National Radiator Reorganization

Bankers Trust Company, 16 Wall Street, New York, N. Y.

Attention of Mr. E. E. Beach, Assistant Secretary

DEAR SIRS: Reference is made to the letter dated January 29, 1931, addressed to you by President John H. Waters [fol. 752] of National Radiator Corporation, requesting your good services in mailing on behalf of the above-named Reorganization Committee documents relating to the above-mentionend Reorganization Plan and Agreement. You are hereby requested, for the account and at the expense of said Reorganization Committee, to mail to all hold-

ers of the 6½% Sinking Fund Gold Debentures of said Corporation, according to your record of their names and addresses, a letter (copies of which, with envelopes, are being furnished you) announcing the deposits under said Plan and the extension of time within which further deposits thereunder may be made.

Very truly yours, —— ——, Secretary National Radiator Corporation Reorganization Committee.

EXHIBIT No. 6—ARTZ & RAMSEY

Settlement Agreement, dated September 15, 1931, between Rudolph B. Flershem, Charles O. Cornell and John H. Waters, as the Reorganization Committee (hereinafter called the "Reorganization Committee") constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation (hereinafter in its separate parts called the "Reorganization Plan" and "Reorganization Agreement" and together the "Reorganization Plan and Agreement"), party of the [fol. 753] first part, and Charles C. Hood, Bernhard A. Bernstorf, Frank B. Cahn, Earle C. Reed, and Henry F. Whitney, as a Committee (hereinafter called the "Protective Committee") constituted under the Deposit Agreement dated as of February 2, 1931, between said Protective Committee and certain Holders of 6½% Sinking Fund Gold Debentures of National Radiator Corporation (said Deposit Agreement being hereinafter called the "Deposit Agreement" and said Debentures being hereinafter called the "Debentures"), as party of the second part:

Whereas, the Reorganization Committee has promulgated the Reorganization Plan and has received for deposit under it at Bankers Trust Company, Depositary, 16 Wall Street, New York, a substantial amount of the entire issue of the Debentures outstanding; and

Whereas, the Protective Committee, through depositaries appointed pursuant to the provisions of the Deposit Agreement, has also received in excess of $851,000 principal amount of the Debentures, which in conformity with the provisions of this Settlement Agreement they are prepared to deposit under and subject to the Reorganization Plan as

hereby augmented and upon the terms herein set forth; and

Whereas, the claims of the Protective Committee for compensation, fees of counsel and other expenses incurred as the Committee constituted and acting under the Deposit Agreement are, in the opinion of the Reorganization Com- [fol. 754] mittee, claims which should be adjusted in connection with the consummation of the Reorganization Plan;

Now, Therefore, in consideration of the premises and of the mutual covenants herein contained, and for other good and valuable consideration, receipt of which is hereby acknowledged; the parties hereto agree as follows:

First. The Reorganization Committee, in the exercise of the powers conferred upon it by the Reorganization Plan, hereby augments said Reorganization Plan by the following supplementary provisions to Article III of the Reorganization Plan:

In respect of the description of the 15-Year 5% Debentures to be authorized by the New Company provided for in said Plan:

(a) In the Indenture under which said Debentures will be issued the New Company will also covenant that so long as any of the New Debentures are outstanding it will not mortgage or pledge any of its property or assets to secure any funded debt as defined in the Indenture without simultaneously making provisions for securing such New Debentures by a prior lien upon such property or assets. The Indenture aforesaid shall contain clauses in this regard substantially similar to those contained in Paragraph (B) of Section 11 of Article IV of the Indenture dated August 1, 1927, under which are now outstanding National Radiator Corporation's 6½% Sinking Fund Gold Debentures.

(b) The Indenture under which the New Debentures are [fol. 755] to be issued shall provide that for the purpose of defining net earnings of the New Company, out of which current and unpaid accumulated interest on said New Debentures will be payable, there shall not be deductible in excess of $300,000, for depreciation in the calendar year 1934 or in any calendar year thereafter.

(c) The Indenture aforesaid shall contain clauses substantially similar to those recited in Article V of the In-

denture dated August 1, 1927, under which are now outstanding National Radiator Corporation's 6½% Sinking Fund Gold Debentures, to the effect that

(1) it shall constitute an event of default should the New Company fail in the observance of any of the covenants or agreements on its part to be performed and the same shall not be remedied within 60 days after written notice of such default shall have been served upon said New Company by the Trustee acting under said Indenture; and

(2) default having occurred as aforesaid, the Trustee acting under said Indenture may in its discretion, and, upon request in writing by the holders of at least 25% in principal amount of the New Debentures then outstanding, shall, upon indemnification satisfactory to it, declare the principal of and interest on all said New Debentures if not already due, to be forthwith due and payable; and

(3) nothing in said Indenture or in the New Debentures or in the coupons attached thereto shall affect or impair [fol. 756] the obligation of the New Company to pay the principal and interest of the New Debentures to the respective holders or registered owners thereof as in such Debentures and coupons stated nor affect or impair the right of action at law of such holders to enforce such payment by virtue of the contract contained in the New Debentures and not by virtue or availing of any provision of the Indenture.

(d) The Indenture aforesaid shall also provide that it shall be an event of default should the net current assets of the New Company, computed according to standard accounting practice, be at the end of any calendar year commencing with the calendar year 1934, less than 55% of the principal amount of the New Debentures at the time outstanding. In the event of such default, the remedies of the Trustee acting under said Indenture shall be as set forth in subdivision (2) of paragraph (c) of section First hereof.

In respect of the $7 Preferred Stock to be authorized by the New Company provided for in said Plan:

(e) Funds legally available for dividends shall be limited to surplus profits or net earnings arising after the organization of the New Company and in no event shall be comprised of paid-in-surplus.

(f) In the calculation of surplus profits or net earnings, available for dividends in any calendar year, deduction [fol. 757] shall first be made therefrom of the earnings during such year payable as debenture interest.

Second. In the exercise of the powers conferred upon it by Article Sixth of the Deposit Agreement and in the performance of the duties thereby imposed, the Protective Committee has approved and adopted and hereby approves and adopts the Reorganization Plan as agumented by the supplementary provisions recited in the preceding paragraph First and upon the terms herein contained.

Third. The Protective Committee, when thereunto requested by the Reorganization Committee, will immediately file with the Empire Trust Company, at its office at 120 Broadway, New York, as the depositary named for such purpose in the Deposit Agreement, a copy of the Reorganization Plan and Agreement incorporating the supplementary provisions recited in paragraph First above, bearing written approval endorsed thereon of not less than a majority of the then members of the Protective Committee, and thereupon will give notice in form approved by the Reorganization Committee of the Protective Committee's approval and adoption of the Reorganization Plan and Agreement as so augmented and of the lodging of a copy thereof with said depositary, such notice to be given in the manner prescribed by Article Twelfth of said Deposit Agreement. Such notice shall also state that holders of Certificates of Deposit issued under the Deposit Agreement who do not elect to withdraw from said Deposit Agreement and from the Reorganization Plan [fol. 758] within 30 days from the date of the first publication of the same, shall be conclusively deemed irrevocably to have waived any right of withdrawal and to have finally assented to and adopted the Reorganization Plan. The Protective Committee will not authorize the withdrawal of any deposited Debentures after the expiration of such 30 days' period.

Fourth. Immediately upon the expiration of the 30 days' period prescribed in the preceding paragraph Third, the Protective Committee will transfer and deliver to the Reorganization Committee at the principal office of its Depositary, Bankers Trust Company, 16 Wall Street, New York, and until such transfer and delivery will hold (subject to the order of the Reorganization Committee, subject only to such right of withdrawal as any holder of a Certificate or Certificates of Deposit for said Debentures may have), all Debentures now and hereafter deposited with the Protective Committee, less only such principal amount thereof as may be withdrawn pursuant to right of withdrawal as aforesaid and said debentures shall be so transferred, delivered and held, free of any lien, charge or claim thereon, except to the extent expressly provided in the following Article Fifth, and accompanied in every instance by the February 1, 1931 interest coupon and subsequently maturing interest coupons appertaining thereto.

Fifth. In the event that the Reorganization Plan, without being consummated, is abandoned or, in the event that the Reorganization Committee shall modify the Reorganization Plan and/or the Reorganization Agreement or any [fol. 759] part thereof or shall adopt a substitute plan and any such modification or substitute plan in the opinion of the Reorganization Committee adversely affects to a material degree the holders of Certificates of Deposit for Debentures, so that the holders of Certificates of Deposit for Debentures shall be entitled to withdraw from deposit under the Reorganization Plan and Agreement any of said Debentures (or the avails thereof), the Protective Committee shall have the right upon written request to the Reorganization Committee to withdraw from deposit under the Reorganization Plan, upon the same terms and conditions as other Depositors under the Reorganization Plan and Agreement, any Debentures deposited under the Reorganization Plan and Agreement at the instance of the Protective Committee pursuant to the preceding Article Fourth.

Sixth. The Reorganization Committee, upon the transfer and delivery by the Protective Committee to the Reorganization Committee, in accordance with paragraph Fourth hereof, of the Debentures deposited with the Protective

Committee and not withdrawn as aforesaid, will include among the reorganization expenses provided for in the Reorganization Plan and Agreement, as proper reorganization expenses, compensation, counsel fees and expenses of the Protective Committee in the sum of $35,000 (less a deduction at the rate of $30 for each $1,000 principal amount of Debentures withdrawn from deposit under the Deposit Agreement and, in consequence, not transferred and deposited under the Reorganization Plan). Such sum [fol. 760] shall be deemed fully paid by the deposit of the same to the account of the Protective Committee with Empire Trust Company, 120 Broadway, New York, it being understood that the Reorganization Committee is to be under no duty to see to the application of such fund.

Seventh. Except to make return to the Protective Committee of the Debentures deposited at the instance of the Protective Committee, in the event of any right arising for the withdrawal of any of the deposited Debentures, as provided in Article Fifth above, or to make the payment provided for in the preceding Article Sixth, the Reorganization Committee assumes no obligation with respect to any of the Debentures deposited under the Reorganization Plan except on the terms and conditions prescribed in the Reorganization Plan and Agreement as augmented as aforesaid. Moreover, nothing in this Settlement Agreement contained shall be taken to mean or imply that the Reorganization Committee is by this Settlement Agreement in any way obligated to the holders of Certificates of Deposit for Debentures deposited under the Reorganization Plan at the instance of the Protective Committee or to the Protective Committee or to any member thereof, except as expressly provided in this Settlement Agreement, the Reorganization Committee as enlarged pursuant hereto, hereby expressly reserving and retaining each and every power, right, immunity and discretion conferred upon the Reorganization Committee by the Reorganization Plan and Reorganization Agreement.

[fol. 761] Eighth. The Reorganization Committee undertakes:

(a) immediately upon the signing of this Settlement Agreement by the parties hereto, to add to its number as an additional member the gentleman whom the Reorganization

Committee shall designate from the present membership of the Protective Committee;

(b) to cause to be made a member of the Board of Directors of the New Company provided for in the Reorganization Plan one of the gentlemen whom the Reorganization Committee shall designate from the present membership of the Protective Committee; and

(c) in the exercise of the powers conferred upon the Reorganization Committee by Article IX of the Reorganization Plan, to cause the certificate of incorporation of the New Company provided for in the Reorganization Plan to contain a provision for cumulative voting and for a Board of Directors comprising such number of members that the aggregate number of votes which can be cast in respect of the shares of voting stock which under the Reorganization Plan are issuable in respect of the Debentures deposited at the instance of the Protective Committee under the Reorganization Plan pursuant to Article Fifth above, shall be sufficient to elect one member of such Board of Directors.

Ninth. Until such time as the Reorganization Plan may be abandoned or the Protective Committee may have the right pursuant hereto and to the Reorganization Plan and Agreement to withdraw from deposit under the Reorgani- [fol. 762] zation Plan the Debentures to be deposited thereunder by it as aforesaid, the Protective Committee, except upon the request and at the expense of the Reorganization Committee, shall not publish or circulate any advertisement or issue any notice or letter to holders of Debentures or certificates of deposit issued by it, either with respect to the affairs of National Radiator Corporation or the Reorganization Plan, it being expressly understood that the initiation or publication of any matters relating to the Reorganization of National Radiator Corporation shall be the prerogative of the Reorganization Committee. The Protective Committee and each member thereof will, however, without additional compensation gladly cooperate with the Reorganization Committee in promoting the Reorganization of National Radiator Corporation, and, at the request and expense of the Reorganization Committee, will issue or join in any notice or letter to its security holders. The member of the Protective Committee who accepts member-

ship on the Reorganization Committee herewith agrees to give his best efforts toward the consummation of the Reorganization Plan and to serve as such member of the Reorganization Committee without compensation. In the event that the Reorganization Plan is consummated, all expenses of issuance and distribution of the new securities to the holders of certificates of deposit issued by the Depositary for the Protective Committee shall be borne by the Reorganization Committee.

Tenth. All of the undertakings and commitments on the part of the Reorganization Committee and the Protective [fol. 763] Committee under this Settlement Agreement are made by them respectively solely in their capacity as the Reorganization Committee constituted under the Reorganization Plan and as the Protective Committee constituted under the Deposit Agreement and no one of the individuals constituting the Reorganization Committee and/or the Protective Committee shall incur any personal liability whatsoever under this Settlement Agreement. The liability of the Reorganization Committee hereunder is expressly limited to such funds as shall properly come into the hands or under the control of the Reorganization Committee by reason of the Reorganization Plan.

In Witness Whereof, the parties hereto have signed and sealed this Settlement Agreement as of the day first above written.

Jno. H. Waters (L. S.), —— —— (L. S.), C. O. Cornell (L. S.), Reorganization Committee, by a Majority. Witness: G. W. Jaques. Henry F. Whitney (L. S.), by Joseph Flers, Proxy, (L. S.), Chas. C. Hood (L. S.), —— —— (L. S.), Bernhard A. Bernstorf (L. S.), Protective Committee, by a Majority. Witness: Joseph Flers.

[fol. 764] EXHIBIT No. 7—ARTZ & RAMSEY

Bankers Trust Company, 16 Wall Street, New York

By H'and

October 2, 1931.

Mr. Armand Erpf, Secretary of Reorganization Committee of National Radiator Corporation, 50 Broad Street, N. Y. C.

DEAR MR. ERPF: We wish to advise that we have today made formal demand for the payment of coupons having a face value of $284,082.50 maturing February 1, 1931 attached to $8,741,000 of National Radiator Corporation 6½% Sinking Fund Gold Debentures deposited with us, and coupons having a face value of $284,310 maturing August 1, 1931, attached to $8,748,000 of Debentures deposited with us.

The Committee has been formally advised that payment was declined for the reason that there are no funds on deposit with which to make such payment.

Very truly yours, C. G. Haviland, Assistant Secretary.

CGH:IA.

12.

[fol. 765] EXHIBIT No. 8—ARTZ & RAMSEY

National Radiator Corporation Reorganization Committee

Minute

The Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931 for the Reorganization of National Radiator Corporation, acting by a majority of its members, whose signatures appear below, hereby takes the following action:

A Settlement Agreement in form and terms approved by this Committee, as such approval shall be evidenced by the signatures to said Settlement Agreement of a majority of its members, to be made with the Protective Committee constituted under the Deposit Agreement dated as of February

2, 1931, is hereby authorized. In the opinion of this Committee, the claims asserted by said Protective Committee are claims which should be settled in connection with the consummation of the Reorganization Plan and Agreement. The compensation, counsel fees and expenses of said Protective Committee up to the amount of $35,000, less a deduction at the rate of $30 for each $1,000 principal amount of Debentures withdrawn from deposit under the aforesaid Deposit Agreement and, in consequence, not transferred and delivered to this Committee, are, in the opinion of this Committee, proper reorganization expenses to be assumed and paid by the New Company provided for in the Reorganization Plan.

[fol. 766] By virtue of authority conferred by Section 16 of the Reorganization Agreement, this Committee adds to its number as an additional member, when and as of the date the above-mentioned Settlement Agreement shall be signed and delivered, Frank B. Cahn.

Dated New York, September 17, 1931.

Jno. H. Waters, C. O. Cornell, Rudolph B. Flershem,
Reorganization Committee.

EXHIBIT No. 9—ARTZ & RAMSEY

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

Minutes of a Meeting of the Above-mentioned Reorganization Committee Held October 1, 1931, at 1:00 o'Clock P. M., in the Offices of Milbank, Tweed, Hope & Webb, at 15 Broad Street, New York, N. Y.

Present: Messrs.. Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters.

Mr. Cahn telephoned his inability to attend. Mr. Bennett and Mr. Ludington were also present and, in the absence of [fol. 767] the Secretary, Mr. Ludington acted as Secretary of the meeting.

Mr. Bennett disclosed to the meeting the pendency in the City Court for New York County of the action instituted by Rae Berger, plaintiff, v. National Radiator Corporation, defendant, by Messrs. Netter, Palley & Netter, attorneys,

with offices at 521 Fifth Avenue, New York, N. Y. This action was for the recovery of interest payable in respect of coupons due February 1 and August 1, 1931, appertaining to 24 of the Debentures of National Radiator Corporation. He stated that he had been informed that this same firm of lawyers proposed bringing a further action upon coupons appertaining to 30 to 36 additional Debentures of the same issue. He also stated that Bankers Trust Company, as Trustee under the Indenture dated August 1, 1927, under which these Debentures had been issued and were outstanding, would be required on request of this Committee, representing in excess of one-fourth in principal amount of these Debentures, to institute an action for the entire interest due and unpaid February 1 and August 1, 1931 upon the entire issue of these Debentures outstanding at said dates. He suggested, therefore, that it was in order at this time for this Committee to determine what course should be pursued not only to forward the purposes of the Reorganization Plan but also to prevent a multiplicity of suits against National Radiator Corporation, with consequent wasteful strife and controversy.

[fol. 768] After lengthy discussion, in the course of which Mr. Cahn, at his office in Baltimore, Maryland, was consulted by telephone, the Reorganization Committee unanimously approved and adopted the following resolutions:

Resolved, that written request be made to Bankers Trust Company, as Trustee under the Indenture dated August 1, 1927, for the 6½% Sinking Fund Gold Debentures of National Radiator Corporation and as Depositary under the Reorganization Plan and Agreement dated February 11, 1931, to demand of National Radiator Corporation payment of the entire amount payable for interest represented by the coupons due February 1 and August 1, 1931, in respect of the aggregate principal amount of said Debentures now on deposit with said Depositary.

Further resolved, that by reason of the default of National Radiator Corporation in payment of interest due February 1 and August 1, 1931 in respect of its Debentures on deposit with this Committee and upon its refusal to pay such interest after demand duly made therefor, Messrs. Milbank, Tweed, Hope & Webb be and hereby are author-

ized and requested to cause to be filed in the District Court of the United States for the Western District of Pennsylvania a Bill of Complaint on behalf of this Committee against National Radiator Corporation, alleging its default as aforesaid and praying for the sale of its properties and the appointment of a receiver or receivers thereof and therefor and for such further relief as may be appropriate. [fol. 769] Further resolved, that ancillary to the Bill of Complaint filed in the United States District Court for the Western District of Pennsylvania, Messrs. Milbank, Tweed, Hope & Webb be and hereby are authorized and requested to cause to be filed against National Radiator Corporation Ancillary Bills of Complaint in the several jurisdictions where its several plants and properties are located and in Delaware, the State of its incorporation.

Further resolved, that local counsel to represent this Committee be selected by Messrs. Milbank, Tweed, Hope & Webb, in consultation with Mr. John H. Waters of this Committee.

Further resolved, that Mr. Charles O. Cornell or any other member of this Committee be and hereby is authorized to sign or verify any Bill of Complaint or other document required for or incidental to the judicial proceedings instituted by and on behalf of this Committee.

The Chairman stated that the foregoing resolutions, unanimously approved and adopted by a majority of the members of said Reorganization Committee at a meeting duly held, constituted the valid act of the Reorganization Committee. The meeting deferred for later action any request upon Bankers Trust Company, as Trustee, to act. No further business appearing, the meeting was thereupon adjourned.

A true copy.

G. Franklin Ludington, Secretary of the Meeting.

[fol. 770] Approved.

Rudolph B. Flershem, Jno. H. Waters, C. O. Cornell,
Reorganization Committee.

EXHIBIT No. 10—ARTZ & RAMSEY

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

Minute.

The undersigned Reorganization Committee hereby determines to borrow of Bankers Trust Company, New York, up to $10,000 and for its loan to give this Committee's promissory note, in form specified by said institution, secured by the pledge of all the Debentures which are now or may hereafter from time to time be on deposit with it as Depositary, or with any successor Depositary, under the above-mentioned Reorganization Plan and Agreement dated February 11, 1931, and all proceeds or avails thereof which may at any time be on deposit with or under the custody or control of the Reorganization Committee.

The proceeds of the aforesaid loan may be drawn against upon the written order of any member of the Reorganization Committee and Bankers Trust Company is hereby au- [fol. 771] thorized and directed to honor and make advances from time to time of the proceeds of the aforesaid loan upon such written order.

The proceeds of said loan may be applied by any member of this Committee drawing against the same to the payment of the expenses of this Committee and the disbursements of its Secretary and, in particular, to the payment in full of the loan, in the amount of not exceeding $6,000 and interest, extended by Empire Trust Company to the Bondholders' Protective Committee, which, by agreement between this Committee and said Bondholders' Protective Committee, this Committee has assumed.

Dated October 31, 1931.

R. B. Flershem, C. O. Cornell, Jno. H. Waters, Reorganization Committee.

[fol. 772] EXHIBIT No. 11—ARTZ & RAMSEY

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Frank B. Cahn, Reorganization Committee. Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, Counsel. Armand Erpf, Secretary, 50 Broad Street, New York.

Minutes of a Meeting of the Above-mentioned Reorganization Committee Held November 28, 1931, at 10:00 o'Clock A. M., in the Offices of Milbank, Tweed, Hope & Webb, at 15 Broad Street, New York, N. Y.

Present: Messrs. Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters.

Absent: Mr. Frank B. Cahn.

Mr. Ludington, in the absence of Mr. Erpf, the Secretary of this Committee, acted as secretary of the meeting.

[fol. 773] Various matters were presented to the meeting and were disposed of as follows:

1. Mr. Ludington projected in summary the procedure to be followed in bringing to a sale the properties and assets of National Radiator Corporation and the subsequent steps to ensue in consummating the reorganization in conformity with the provisions of the above-mentioned Reorganization Plan and Agreement. This summary of procedure as hereinafter stated was considered and approved. The immediate step to be taken is the actual sale of the aforesaid properties and assets, dependent upon the conclusion of the following matters:

(a) Evacuation of all leased warehouses, the leases of which are to be terminated by the receivers. These leases ought to be terminated before the end of the current calendar year, in order that the lessors may be in a position to prove their claims, without extension of time for such purpose, prior to the expiration of the period for the proof of claims now fixed by court order at December 31, 1931. None of these leases ought to be terminated, however, until the entire stock of goods in the particular leased warehouse

has been withdrawn, thus to preclude the lessor from asserting any lien against such goods. Moreover, the principal of the Debentures ought not to be declared due until either these warehouses have been evacuated or ancillary proceedings have been instituted in the jurisdiction in which such warehouses are situated. From an estimate made by Mr. Resley of the cost of withdrawing stored [fol. 774] goods in warehouse it would appear to be cheaper to withdraw such goods from warehouse than to institute ancillary proceedings in each jurisdiction in which a leased warehouse is located.

(b) Preparation should be made to present to the court testimony in respect of the due authorization and issuance of the Debentures, their negotiation and the default in the payment of the interest in respect thereof February 1, 1931; the amount thereof outstanding and the present liquidating value of the properties and assets of National Radiator Corporation.

(c) Reduction of the amount of Debentures outstanding today of $603,000, through efforts to obtain deposits now as well as during the period of advertisement between the actual ordering of a sale of the aforesaid properties and assets and the date when such sale takes place.

Mr. Waters reported in respect of the following leased warehouses:

*Omaha, now empty.
*Indianapolis, now empty.
*Milwaukee, contains goods valued at $21,000.
*Cleveland, contains goods valued at $25,000.
*St. Louis, contains goods valued at $25,000.
*Philadelphia, contains goods valued at $10,000.
Brooklyn, contains goods valued at $25,000.
Toronto, contains goods valued at $5,000.

*Leases to be terminated, with this Committee's approval.

[fol. 775] Conditioned upon the conclusion of the foregoing, the Reorganization Committee in respect of the deposited Debentures will request Bankers Trust Company, as Trustee under the Indenture securing the same, to declare due immediately the principal of all of the Debentures outstanding under said Indenture. Bankers Trust Company,

as Trustee would then declare due such principal and would obtain a judgment for the amount of all of said Debentures. With such judgment it would then intervene as a party plaintiff in the proceeding pending in the United States District Court for the Western District of Pennsylvania. Thereupon

(d) An official inventory and an appraisal by the court's appraisers of the assets of National Radiator Corporation must be filed.

(e) A hearing as to the fairness of the above-mentioned Reorganization Plan and Agreement should be had, concluding with an application to the court for an order of sale of the properties and assets of the National Radiator Corporation.

The order of sale will be preceded by some period of notice to creditors and other parties in interest and should result in a final decree, fixing the date of actual sale. There will then ensue a period of time for publication of notice of sale, during four successive calendar weeks, as required by the Federal statutes. Then in the ordinary course, the sale will take place and, if the price bid was not less than the upset price, or, if there were no upset price, would be reported back to the court for confirmation. In the event of [fol. 776] the sale being at a price deemed by the court inadequate or less than the upset price a new sale might be ordered; otherwise confirmation of the sale could be expected.

2. Consideration was next given to what would be the probable amount of the upset price, in the event that an upset price were insisted upon by the court in ordering a sale of the National Radiator Corporation properties. Mr. Ludington stated that its amount would be based on a number of factors: namely, actual cash on hand, the capitalization of earnings, the market value of the Corporation's securities and the probable liquidating value of the Corporation's plants and other assets. $1,400,000 of cash would seem to fix the minimum, and the probable liquidating value of the plants and other assets would seem to fix the maximum, amount of such upset price. As to such liquidating value the following estimate was tentatively arrived at:

Cash	$1,400,000
Accounts receivable	600,000
Inventory	600,000
Total current assets	$2,600,000
Plant and equipment	1,000,000
Total properties and assets	$3,600,000
Outstanding Debentures	$10,707,000
Accrued interest	985,000
Current liabilities	223,000
Total proyable claims	$11,915,000

[fol. 777] This yields $30 per $100 of Debentures and in respect of the $603,000 of Debentures outstanding would require a distribution of $180,900. It was the sense of the meeting, therefore, that Mr. Cornell should visit Johnstown for the purpose of making an analysis of the various properties and inventory, so that a considered valuation could be arrived at for them. Mr. Waters undertook to collect data having bearing upon the sale of surplus materials by the American Radiator Company, also correspondence and other papers relating to previous efforts of National Radiator Corporation during the past two years to sell its Framingham, Tonawanda and Dunkirk plants.

G. F. Ludington, per Mr. Waters' letter dated December 7, 1931.

3. Mr. Waters undertook to report on the probable period of time required and the cost involved in the evacuation of the leased warehouses mentioned above, in which stocks of goods still remain.

4. This Committee approved and signed, subject to delivery upon its further instructions, a written request directed to Bankers Trust Company, as Trustee, to declare due the principal of all of the outstanding Debentures of National Radiator Corporation.

5. Mr. Cornell reported that Bankers Trust Company was of opinion that the transfer agency for both classes of stock of the new company should go to one institution, preferably the Bankers Trust Company, and that the registrarship of both of said classes of stock should go to

[fol. 778] another institution, preferably the Marine Midland Trust Company. Bankers Trust Company also suggested New York Trust Company as Trustee for the new debentures. Upon this report it was decided that the Bankers Trust Company be the Transfer Agent for the common stock and preferred stock of the new company and that the Marine Midland Trust Company be the Registrar of the common stock and preferred stock of the new company and that Mr. Cornell express to Bankers Trust Company the wish of this Committee, to be effective, unless actually disapproved of by Bankers Trust Company, that the Trustee for the new debentures be the Manufacturers Trust Company.

6. Mr. Waters requested that the certificate of incorporation and Indenture to secure the new debentures of the new company be prepared at an early date. He undertook to consider with his counsel and report to this Committee his wishes with respect to the State of incorporation of the new company, it being the sense of the meeting that in the absence of countervailing considerations the new company should be organized under the laws of the State of Pennsylvania and should acquire unto itself all of the properties and assets of National Radiator Corporation, without intervention of subsidiary companies.

7. The personnel of the new company's Board of Directors was given consideration and was referred to Messrs. Flershem and Waters for ultimate decision. Mr. Cornell was requested to ascertain of Bankers Trust Company and of J. & W. Seligman & Co. if they had any sug-[fol. 779] gestions to make in respect to membership on said Board of Directors. It was the sense of the meeting that said Board of Directors should consist of twelve members, one of whom would be Mr. Frank B. Cahn and that the remaining members should be persons satisfactory to Mr. Waters and of his nomination, to the extent that circumstances did not require the inclusion of any others.

No further business appearing, the meeting was thereupon adjourned.

A true copy.

G. Franklin Ludington, Secretary of the Meeting.

Approved:

Rudolph B. Flershem, Jno. H. Waters, C. O. Cornell.

IN UNITED STATES DISTRICT COURT

ORDER AUTHORIZING RECEIVERS TO INVEST CASH, ETC.—Filed Oct. 23, 1932

And now, October 23rd, 1931, the foregoing petition presented in open court by Reed, Smith, Shaw & McClay (Maynard Teall of counsel), attorneys for the petitioners, and on consideration thereof it is ordered:

That the Receivers herein be and hereby are authorized to invest from time to time, reinvest, and keep invested, in obligations of the Government of the United States maturing not more than six months after date of the investment, [fol. 780] such amount or amounts of cash of the receivership estate as, in the judgment of the Receivers, is not needed at the time for expenses and working capital; and that said Receivers be and hereby are further authorized to sell all or any part of said investments at any time, or from time to time.

Per Curiam.

G

[fol. 781] National Radiator Corporation

Inventory of Assets (Book Value) at Close of Business October 8, 1931

Summary

Cash:	
On Hand	$4,463.67
In Banks	1,252,917.92
Total Cash	$1,257,381.59
Notes & Accounts Receivable Less Reserve:	
Notes Receivable Affiliated Company	$366,257.83
Notes Receivable—Regular	145,519.77
Notes Receivable—National Protective Payment	207,197.41
Accounts Receivable—Regular	945,539.07
Accounts Receivable—Special	2,168.47
Accounts Receivable—Employees	6,691.04
Total Notes & Accounts Receivable	$1,673,373.59
Less Reserve for Bad and Doubtful Notes and Accounts Receivable	179,046.37
Total Notes & Accounts Receivable—Less Reserve	$1,494,327.22

Inventories:	
Raw Materials	$179,244.10
Stores	326,291.14
Products	1,332,564.59
Consigned Stocks	210,802.14
Total Inventories	$2,048,901.97
Investments:	
Stocks	$99,377.21
Bonds	5,205.15
Real Estate—Edgewater Apartment Hotel	51,172.31
Life Insurance Policies (Cash Surrender Value)	18,984.00
Total Investments	$174,738.67
Special Deposits:	
New York State Highway Bonds (Deposited with Department of Labor, that State)	$15,550.40
Fixed Assets (Less Reserve for Depreciation)	
Land	$708,195.42
Buildings	3,275,869.78
Machinery & Equipment	2,325,198.93
Patterns & Flasks	434,155.02
Total Fixed Assets (Less Reserve for Depreciation)	$6,743,419.15
Deferred Assets and Prepaid Expenses:	
Prepaid Insurance	$44,654.01
Experimental Appropriations	160,849.23
Rents Paid in Advance	3,432.82
Membership Paid in Advance	989.32
Total Deferred Assets and Prepaid Expenses	$209,925.38
Total Assets (Book Value)	11,944,244.38

[fol. 782]

SECTION 54 OF FINAL DECREE OF SALE—EXHIBIT "B"

Balance Sheet of National Radiator Corporation as of October 8, 1931, Giving Effect to Operations of the Receivers of National Radiator Corporation to and Including June 30, 1932

Assets

Current Assets:		
Cash in Banks and on Hand		$526,520.90
Marketable Securities at Cost including Accrued Interest—Schedule B-1		1,044,531.25
Notes and Accounts Receivable less Reserve for Bad Debts		641,189.17
Inventories of Raw Materials, Finished and Semi-Finished Stocks at Cost (Book Value)		1,671,605.91
		$3,883,847.23
Investments in Stocks, Bonds, Real Estate, Etc. At Cost—Schedule B-2		88,873.41
Advances to and Investments in Affiliated Companies—Schedule B-3		454,067.25
Special Deposit under New York State Self Insurance Law, Funds for Interest on Predecessor Company's Bonds, etc.		16,355.10
Real Estate, Machinery, Patterns and Other Equipment (per books, as appraised December 31, 1926 plus subsequent net additions at cost)	8,599,183.26	
Less Reserve for Depreciation	2,210,864.43	
		6,388,318.83
Good Will, Trademarks and Patents		6,634,501.90
Deferred Charges and Prepaid Expenses		166,475.65
		$17,632,439.37

Liabilities and Capital

Current Liabilities:		
Accounts Payable		$99,044.35
Taxes and Other Accrued Accounts (Including unsettled claims of Commonwealth of Pennsylvania for Capital Stock and Corporate Loans Taxes Years 1930–1931—Estimated $18,100.00)		132,491.16
Accrued Interest on Debentures		1,325,257.90
		1,556,793.41
Reserve for Interest on Predecessor Company's Bonds, Serial Notes Payable, Etc.		81,901.25
6½% Sinking Fund Gold Debentures Originally Issued	12,000,000.00	
Redeemed to Date	1,327,000.00	
Outstanding June 30, 1932		10,673,000.00
Capital Stock (Stated Value), $7 Cumulative Convertible Preferred Stock (No Par Value 58,646 Shares Outstanding and Common Stock (No Par Value) 272,708 Shares Outstanding	10,000,000.00	
Deficit	4,679,255.29	
		5,320,744.71
		$17,632,439.37

[fol. 783] COMPLAINANT'S EXHIBIT No. 15

Reorganization of National Radiator Corporation under Plan and Agreement Dated February 11, 1931

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Armand Erpf, Secretary, 50 Broad Street, New York. Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, Counsel

October 1, 1931.

Bankers Trust Company, 16 Wall Street, New York, N. Y.

DEAR SIRS: You are hereby requested and directed as Depositary for the Reorganization Committee to present at the principal office of Bankers Trust Company, and make formal demand for the payment of, all coupons due February 1, 1931, or August 1, 1931, which are held by you as Depositary.

Will you kindly advise the Secretary of the Reorganization Committee in writing when such formal demand has [fol. 784] been made, and at the same time confirm to us the aggregate principal amount of coupons due on each of the above mentioned dates in respect of which such demand is made.

Very truly yours, Rudolph B. Flershem, Jno. H. Waters, C. O. Cornell, Reorganization Committee.

COMPLAINANT'S EXHIBIT No. 16

Bankers Trust Company, Corporate Agency Department

B. W. Jones, Vice-President; H. B. Watt, Vice-President and Secretary; L. H. Plumb, E. E. Beach, L. C. Outcault, C. G. Haviland, C. A. Zollinhofer, G. M. Meyer, Assistant Secretaries

New York: 16 Wall Street, Fifth Avenue at 42nd Street, Madison Avenue at 57th Street. Paris: 3 & 5 Place Vendome. London: 26. Old Broad Street, E. C. 2.

[fol. 785] Cable Address: New York & Paris-Banktrust; Cable Address: London-Bantruscom

O. K. for filing opn. Paying Harwood.

16 Wall Street, New York, October 2, 1931.

Bankers Trust Company, 16 Wall Street, New York, N. Y.

GENTLEMEN: On behalf of and as Depositary for Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931,

for the Reorganization of National Radiator Corporation, we herewith present for payment National Radiator Corporation 6½% Sinking Fund Gold Debenture interest coupons due February 1, 1931, aggregating $284,082.50 and similar interest coupons due August 1, 1931, aggregating $284,310; and we hereby, on behalf of said Committee, demand payment of said interest coupons and each of them.

Very truly yours, Bankers Trust Company, Depositary, by C. G. Haviland, Assistant Secretary.

CGH. EMW.
12.

[fol. 786] COMPLAINANT'S EXHIBIT No. 20

District Court of the United States for the Western District of Pennsylvania

Law. No. 6776

BANKERS TRUST COMPANY, Trustee,

vs.

NATIONAL RADIATOR CORPORATION

Docket Entries.

Oct. 13, 1931. Præcipe for summons in Assumpsit filed.
" Statement of Claim filed.
" Summons issued.
" Præcipe for appearance of H. S. Endsley for
" deft. filed.
" Affidavit of Defense of deft. corp. filed.
" Præcipe for appearance of Reed, Smith, Shaw & McClay for receivers of deft. corp. filed.
" Affidavit of Defense of deft. corp. by receivers filed.
" Præcipe for judgment for amount admitted to be due filed.
" Pursuant to præcipe filed, judgment is hereby entered in favor of the Bankers Trust Co., Trustee, Plff., and against National Ra-

diator Corp., deft., for the sum of $713,-944.38, liquidated as follows:

First item of principal	$346,872.50
Int. from Feb. 1, 1931, to Oct. 13, 1931, at 6½%	15,690.04
[fol. 787] Second item of principal	346,872.50
Interest from Aug. 1, 1931, to Oct. 13, 1931, at 6½%	4,509.34
Total	$713,944.38

J. Wood Clark, Clerk.

Oct. 13, 1931. Summons returned served on Carl E. Resley, Sec'y & Treas., for National Radiator Corp. and on W. G. Heiner and Robert L. Waters, Receivers for National Radiator Corp. at Pittsburgh, on Oct. 13, 1931.

In the District Court of the United States for the Western District of Pennsylvania

Law. No. 6776

BANKERS TRUST COMPANY, Trustee, Plaintiff,

against

NATIONAL RADIATOR CORPORATION, Defendant

Oct. 13, 1931, Pursuant to præcipe filed, judgment is hereby entered in favor of the Bankers Trust Co., Trustee, plff., and against National Radiator Corp., deft., for the sum of $713,944.38, liquidated as follows:

First item of principal	346,872.50
Interest from Feb. 1, 1931, to Oct. 13, 1931, at 6½%	15,690.04
[fol. 788] Second item of principal	346,872.50
Interest from Aug. 1, 1931, to Oct. 13, 1931, at 6½%	4,509.34
	713,944.38

J. Wood Clark, Clerk.

I certify that the foregoing is a true and correct transcript of judgment entered in favor of the plaintiff and

against the defendant in the above entitled cause as the said judgment appears of record in this court.

(Signed) J. Wood Clark. (Seal.)

COMPLAINANT'S EXHIBIT No. 26

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Law. No. 6851

BANKERS TRUST COMPANY, Trustee,

vs.

NATIONAL RADIATOR CORPORATION

Docket Entries

Dec. 30, 1931. Præcipe for summons in assumpsit filed.
" Statement of Claim filed.
" Præcipe for appearance of Reed, Smith, Shaw & McClay for deft. filed.
" Affidavit of Defense filed by receivers.
" Præcipe for Appearance of H. S. Endsley for defendant corporation filed.

[fol. 789]

" Affidavit of Defense of National Radiator Corp., filed.
" Præcipe for judgment for the amount admitted to be due in defendant's affidavit of defense filed.
" Pursuant to præcipe judgment is hereby entered in favor of Bankers Trust Company, Trustee, plaintiff, and against the National Radiator Corp., defendant, in the sum of $10,960,295.83, liquidated as follows:

Principal of debentures	10,673,000.00
Int. thereon from Aug. 1, 1931, to Dec. 24, 1931	275,597.33
	10,948,597.33

Int. on $10,948,597 from Dec. 24, 1931, to Dec. 30, 1931, at 6%	11,698.50
Total	10,960,295.83

J. Wood Clark, Clerk.

Certified from the record this 30th day of December, 1931.

J. Wood Clark, Clerk.

[fol. 790] IN UNITED STATES DISTRICT COURT

STIPULATION IN RE RECORD ON APPEALS BY JOSEPHINE RAMSEY, AMY ARZT, AND EDWARD J. RAMSEY—Filed Nov. 21, 1932

Whereas, the record on appeal, in these appeals by Josephine Ramsey, Amy Arzt and Edward J. Ramsey, consist in part of matter contained in the Consolidated Record heretofore printed and filed in the appeals by First Nationel Bank of Cincinnati and International Heater Company, now pending at Nos. 4959 and 5020 in the United States Circuit Court of Appeals for the Third Circuit.

It is therefore stipulated and agreed that the Consolidated Record heretofore printed and filed in this cause by the said appellants, First National Bank of Cincinnati and International Heater Company, shall be, and the same hereby is made a part of the record in each of the appeals by Josephine Ramsey, Amy Arzt and Edward J. Ramsey, the appellants herein; that, in the appeals by the said Josephine Ramsey, Amy Arzt and Edward J. Ramsey, it shall not be necessary to print, serve or file any matter contained in the said Consolidated Record; that said Consolidated Record may be treated and used upon each of these appeals with the same force and effect as if it were contained and printed in this record; that the numbering of the pages in these appeals by Josephine Ramsey, Amy Arzt and Edward J. Ramsey shall follow consecutively the numbering in said Consolidated Record and for that reason shall com-
[fol. 791] mence with page number 721; and that the tran-

script of the record in each of these appeals by the said Josephine Ramsey, Amy Arzt and Edward J. Ramsey shall consist of the said Consolidated Record and the following:

1. The following statement:

"Pages 1 to 720, inclusive, of this record are contained in the Consolidated Record filed in this cause in the appeals by First National Bank of Cincinnati and International Heater Company, now pending in this Court at Nos. 4959 and 5020, which Consolidated Record has, by stipulation herein (R. 790), been made a part of this record."

2. Docket entries made subsequent to the last entry appearing in the docket entries contained in the Consolidated Record;

3. Petition of Josephine Ramsey objecting to the confirmation of sale and to the Plan of Reorganization;

4. Petition of Amy Arzt objecting to the confirmation of sale and to the Plan of Reorganization;

5. Petition of Edward J. Ramsey objecting to the confirmation of sale and to the Plan of Reorganization;

6. Appellants' exception to the decree entered on September 8th, 1932, confirming sale and approving deed;

[fol. 792] 7. Petition for appeal of Josephine Ramsey and Amy Arzt, order of Court allowing that appeal and assignments of errors filed on November 4th, 1932;

8. Petition for appeal, of Edward J. Ramsey, order of Court allowing that appeal and assignment of errors filed on November 4th, 1932;

9. Arzt and Ramsey Exhibit No. 2;

10. Arzt and Ramsey Exhibits Nos. 4, 5, 6, 7, 8, 9, 10 and 11;

11. Order entered on October 23rd, 1931, authorizing receivers to invest in Government securities;

12. Summary only ("Sheet 1 of 235") of assets of National Radiator Corporation as set forth in receivers' report filed January 2nd, 1932, and omitting therefrom the detailed schedules;

13. Exhibit "B"—Balance Sheet—(page 9) only from the "Statement Filed by Receivers Pursuant to Section 54

in Article XV of the Final Decree of Sale", filed July 28th, 1932;

14. The following exhibits identified in the testimony of William C. Meyers, filed March 3, 1932:

(a) Complainants' Exhibit 15. (Letter dated October 1, 1931, from Reorganization Committee to Bankers Trust Company.)

(b) Complainants' Exhibit 16. (Letter dated October 2, 1931, from Bankers Trust Company, Depositary, to Bankers Trust Company.)

[fol. 793] (c) Docket entries and transcript of judgment (but omitting clerk's certification) from Complainants' Exhibit 20 (suit by Bankers Trust Company, as Trustee, against National Radiator Corporation in the District Court of the United States for the Western District of Pennsylvania at No. 6776 Law).

(d) Docket entries and transcript of judgment from Complainants Exhibit 26 (suit by Bankers Trust Company, as Trustee, against National Radiator Corporation in the District Court of the United States for the Western District of Pennsylvania at No. 6851 Law).

15. This stipulation.

It is further stipulated that any party hereto may refer to the contents of any exhibit which is not printed in this record in full, or which is wholly omitted therefrom, with the same force and effect as if it were set forth in full in this record, and that, if desired, such exhibit may be handed up to the court at the time of the argument.

David N. Palley, Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Josephine Ramsey, Amy Arzt, and Edward J. Ramsey, [fol. 794] Appellants. Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for Rudolph B. Flershem et al. as the Reorganization Committee; Carl E. Resley, G. Franklin Ludington, and National Radiator Corporation, a Maryland Corporation, Appellees, and the Receivers. H. S. Endsley, Solicitor for National Radiator Corporation, a Delaware Corporation, Appellee. J. Garfield Houston, Solicitor for Bankers Trust Company, Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 795] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 4959

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER CO., Appellants,

vs.

R. B. FLERSHEM et al., Reorganization Committee National Radiator Corp., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

ORDER ASSIGNING JUDGES—Filed Dec. 14, 1932

And now, to-wit, this 14th day of December, A. D. 1932, it is ordered that Hon. Oliver B. Dickinson, District Judge or the Eastern District of Pennsylvania, and Hon. William H. Kirkpatrick, District Judge for the Eastern District of Pennsylvania, be, and they are hereby, assigned to sit in above case in order to make a full court.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 796] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 5020

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER CO., Appellants,

vs.

ROBERT S. WATERS et al., Rcvrs. National Radiator Corp., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

ORDER ASSIGNING JUDGES—Filed Dec. 14, 1932

And now, to-wit, this 14th day of December, A. D. 1932, it is ordered that Hon. Oliver B. Dickinson, District Judge for the Eastern District of Pennsylvania, and Hon. William

H. Kirkpatrick, District Judge for the Eastern District of Pennsylvania, be, and they are hereby, assigned to sit in above case in order to make a full court.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 797] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1932

Nos. 4959 and 5020

[Title omitted]

Motion to Dismiss Appeals of Interveners, First National Bank of Cincinnati and International Heater Company—Filed Dec. 14, 1932

And now, to-wit, this 14th day of December, 1932, come the Reorganization Committee, complainants in the above entitled cause and appellees herein, and by their undersigned solicitors move this Honorable Court to dismiss with costs the appeals taken herein at the numbers above stated by Interveners First National Bank of Cincinnati and International Heater Company from Decrees of the District Court of the United States for the Western District of Pennsylvania entered May 31 and September 8, 1932, upon the ground that said appeals have not been joined in by the defendant National Radiator Corporation and there has been no severance or equivalent proceeding to entitle said appellants to prosecute these appeals without joiner of necessary parties appellant, including their co-defendant [fol. 798] National Radiator Corporation, which is a necessary party to these appeals.

Maynarl Teall, Reed, Smith, Shaw & McClay, Solicitors for the Appellees, Reorganization Committee, Union Trust Building, Pittsburgh, Pennsylvania.

[File endorsement omitted.]

[fol. 799] Minute entry of argument and submission, December 14, 1932, and January 10, 1933, omitted in printing.

[fol. 800] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 4959, 5020, October Term, 1932

RUDOLPH B. FLERSHEM et al., Committee for the Reorganization of National Radiator Corporation, and Bankers Trust Company, Trustee,

vs.

NATIONAL RADIATOR CORPORATION, Defendant, and First National Bank of Cincinnati and International Heater Company, Intervening Defendants and Appellants

No. 4956, October Term, 1932

LILY CLAPIER, Appellant,

vs.

RUDOLPH B. FLERSHEM et al., Appellees

No. 5037, October Term, 1932

JOSEPHINE RAMSEY et al., Appellants,

vs.

RUDOLPH B. FLERSHEM et al., Appellees

[fol. 801] No. 5040, October Term, 1932

EDWARD J. RAMSEY, Appellant,

vs.

RUDOLPH B. FLERSHEM et al., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

Before Woolley, Circuit Judge, and Dickinson and Kirkpatrick, District Judges

OPINION—Filed March 24, 1933

WOOLLEY, Circuit Judge:

The National Radiator Corporation was engaged in the manufacture and sale of radiators, boilers and other in-

strumentalities of radiation. It was organized in 1927 by the consolidation or merger of six independent companies in the radiator industry. Preliminary to the consolidation an appraisal of their assets was made in the sum of $26,192,000 (speaking for convenience always in round numbers).

Upon the basis of this appraisal and a showing of earnings of the constituent companies for the previous four years in sums between $2,456,000 and $3,488,000 a year, the new corporation, with $2,972,000 in cash and current liabilities of $1,478,000, issued $12,000,000 Gold Sinking Fund Debentures, bearing 6½ per cent. interest, of which $10,705,000 became outstanding. It also issued 60,000 shares of $7.00 Cumulative Convertible Preferred Stock and 270,000 shares (no par value) of common stock at an estimated value of $11,500,000, making total liabilities to security holders of all grades of about $23,000,000. Neither then nor later did it place mortgage liens upon its properties.

[fol. 802] With this capital structure, completed in August 1927, the new corporation embarked in business and earned $993,000 in the last four months of that year.

In 1928, however, the construction of residential, commercial and industrial buildings throughout the country, on which the business of the corporation was dependent, began to fall off. Immediately unfavorable competitive conditions developed. Construction work continued to decline, causing the corporation to suffer in each of the three years succeeding its organization an average deficit of $600,000 before interest on the debentures or a deficit of $1,310,000 after interest but before sinking fund charges. In this situation, which was becoming progressively worse, the corporation defaulted in interest on the debentures due February 1, 1931, though unquestionably having in hand more than enough money to pay it. A Reorganization Committee, being appointed, set to work and evolved a plan to which we shall advert presently. To this plan about 96 per cent of the security holders assented. About 3 per cent stood silent and 1 per cent objected. This took time. Another interest payment came due August 1, 1931 on which the corporation defaulted. It defaulted also on its sinking fund obligation, though having enough money in hand to pay the former and partially, if not wholly, to meet

the latter. During these successive defaults the corporation was, naturally enough, harassed by suits and threats of suits. To prevent waste in the creditors' race of diligence and to protect security holders, the members of the Reorganization Committee, on October 1, 1931, filed a bill in the District Court praying for the appointment of receivers. Their prayer was granted.

The receivers, nine or ten months after their appointment, asked the court for an order authorizing them to sell all the assets of the corporation at a judicial sale for an upset price to be named by the court and under terms of [fol. 803] the Reorganization Plan. The plain purpose of the application was to dispose of the corporation's assets in a manner which would conserve and hold them as a going concern for the protection of the senior security holders.

The court made such an order. In August 1932, the receivers sold all the assets on the bid of the Reorganization Committee and the court confirmed the sale. The position of the objecting security holders (now appellants) is that, assuming but never conceding its jurisdiction to order and confirm the sale, the court erred in fixing the upset price of $2,500,000 and in confirming the sale for $2,550,000.

On the motion for an order of sale the learned trial judge set about to fix an upset price by determining the fair market value of the assets, an almost insuperable task when considered with respect to their character, the feeble market for some of them and, in these extraordinary times, an entire absence of a market for others. He had before him book values of upwards of $18,000,000 which, manifestly, were values out of all relation to the actualities. He was dealing with a proposed sale in the midst of a great business depression and therefore was concerned with selling values; doubtless realizing that, ordinarily, a thing is worth only what it will fetch. He called upon all parties for evidence on the subject. The complainants, at a hearing lasting four days, produced a mass of facts, figures and opinions; the objecting security holders produced nothing. On the uncontradicted evidence, which was all he had to go on, the learned judge set an upset price for all assets of the corporation at $2,500,000, or $200,000 more than the highest figure the witnesses had given of what might be expected in liquidation.

We have at much labor studied and absorbed this record. a recital of the mass of facts and figures would add nothing to the decision of the case. It will be sufficient to say [fol. 804] that, notwithstanding what on first view is a startling disparity between book values and market values, we cannot find on the evidence that the learned judge erred in naming the price in the order of sale. If the upset price of $2,500,000 reflected the fair market value of the assets, we cannot find on the assignment charging error in confirming the sale that the purchase price of $2,550,000 was inadequate. At this figure, the purchase price was two per cent above the upset price and ten per cent above the highest price the evidence indicated as likely to be realized in liquidation.

The assignments charging error in the order of sale and the order of confirmation are dismissed.

The law of the case arises out of a demand by the appellant-securityholders that they be paid and, to that end, the corporation be put in liquidation, and out of their challenge of the jurisdiction of the court to appoint receivers and order a sale of assets under the proposed plan of reorganization which they say was devised by certain securityholders and officials of the corporation and the trustee for the debentures in fraud of other securityholders.

We shall briefly dispose of the last question—collusion and fraud—by giving our judgment, which is in complete accord with the finding of the learned trial judge, that while the evidence shows consultation and cooperation between these several parties in formulating the plan it does not disclose collusion or fraud.

We have now reached the central question in the case, that of jurisdiction of the court to entertain the bill for receivers. It is pertinent to note the bill did not say the corporation was insolvent. That, in effect, was a tacit admission or declaration of its solvency. The corporation, by its answer, admitted the truth of all allegations of the bill. [fol. 805] Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. It was perhaps not then known, as was subsequently proved, that the corporation was insolvent within the definition of the Bankruptcy Act (Section 1, cl. 15), where "the aggregate of (its) property * * * (was) not,

at a fair valuation, sufficient in amount to pay (its) debts". Whatever may have been the corporation's condition as to solvency at the time of bringing the action, clearly the bill was filed on the assumption of its solvency, yet on the need of a conservation receivership for the protection of securityholders who ranked as creditors. Although after the appointment of receivers and before sale of the assets, the Bankers Trust Company, trustee for the debentures, brought two suits against the corporation, one for interest in arrears, the other for the principal of the debentures, and obtained judgments in the aggregate amount of $11,674,000, thereby indicating, as a practical matter, that the corporation was then insolvent within any of the definitions, we shall continue to regard the receivership, according to the tenor of the bill, as one for conservation of assets. In this connection it should be noted as bearing on the court's jurisdiction that the complainants in the bill were not judgment creditors. The respondent corporation, however, tacitly waived that fact and expressly consented to the decree. The Pusey & Jones Company vs. Hanssen, 261 U. S. 491, 497; Shapiro vs. Wilgus, 287 U. S. 348. Thereafter the Bankers Trust Company, plaintiff in the two judgments and then a judgment creditor of the corporation, was allowed to intervene as party-plaintiff in this case and thenceforward participated in its prosecution.

The appellants' attack on the jurisdiction of the court to entertain the bill, appoint receivers and order a sale of assets as an entirety is disclosed by the three questions they have presented:

[fol. 806] (1) "May a federal court of equity, in the absence of other equitable grounds, take jurisdiction of a foreign corporation which is solvent and able, in regular course, to pay its obligations in full, for the primary purpose of reorganizing it?"

(2) "May a federal court of equity, in the absence of other equitable grounds, and solely for the purpose of reorganizing a corporation which is not insolvent nor in imminence of insolvency appoint receivers to take possession of such corporation's property until it can be sold?"

The plain answer to these questions is "no".

The phrase "in the absence of other equitable grounds" compels this answer because it excludes the essence of the

court's jurisdiction in such matters. It is the presence of equitable grounds calling for relief in equity which gives the court jurisdiction. A court of equity is not a forum of convenience to be used by a corporation merely to straighten out its business difficulties or to rebuild its financial structure. Nor is it a place of refuge to which debtors may go for protection against their creditors and against the remedies of suit, judgment, execution and sale which the law affords them. Debtor corporations are not wards of chancery. There is nothing in the mere fact of a corporation's indebtedness, nor in its inability to pay, nor in its wish to make some composition with its creditors that confers equitable jurisdiction upon a court. It is only when [fol. 807] there is something in a situation which sets up an equitable right and admits of equitable relief that parties may go into a court of equity and assert one and obtain the other. Common instances are where a corporation is insolvent or where its insolvency is imminent. Even in the latter case the right of a federal court of equity (cautiously exercised) to appoint receivers at the instance of simple contract creditors if the debtor corporation consents, is not, as one of the appellants admits, debatable. Michigan vs. Michigan Trust Company, 286 U. S. 334; Shapiro vs. Wilgus, 287 U. S. 348.

The appellants' third question, however, contains no nullifying exceptions and goes directly to the point. It is:

(3) "Does the bill of complaint in the primary cause set forth facts sufficient to constitute a cause of action for the appointment of receivers or for other equitable relief?"

The bill must, as we have stated, have equity, and equity will not lie in the mere fact, if such were the case, that the corporation could not pay interest. Here the corporation could presently pay, but payment foretold imminent consequences disastrous to the corporation and, what is more to the point, disastrous to its securityholders. Plainly those consequences were insolvency with its attendant evils to all concerned. The fact that the corporation had in hand sufficient money to meet certain current indebtedness did not alter the underlying conditions. Continental & Commercial T. & S. Bank vs. Allis-Chalmers Co., 200 Fed. 600, 613; In re Babcock, 26 Fed. (2d) 153. The facts of the situation, showing, as we find, imminence of insolvency and collapse,

calling for protection of creditors, constituted a ground of equity for which relief could validity be asked by simple contract creditors within the law of The Pusey & Jones Company vs. Hanssen, 261 U. S. 491 and within the warning of Shapiro vs. Wilgus, 287 U. S. 348. The case therefore falls within the rule distinguished and succinctly stated by Judge Learned Hand in Luhrig Collieries Co. vs. Interstate Coal & Dock Co., 281 Fed. 265, 268, 269. There he showed that a bill of the character of this one, filed by simple contract creditors, is an evolution out of the judgment [fol. 808] creditors' bill to supplement the writ of execution, of which a court of equity may, with caution, assume jurisdiction with the consent of the debtor corporation. Re Metropolitan Railway Company, 208 U. S. 90. He then said:

"But if it appears that the assets of every kind are not enough to pay all creditors, if left to a general welter of attachments, executions, and separate creditors' bills, a different situation is presented. The corporation may well be solvent if its assets be nursed along, and insolvent if they be thrown to the creditors for piecemeal sale. Recognizing in such event that creditors' bills will in the end be necessary, though unsuccessful, equity will anticipate them by presently stepping in, in the interest of securing the greatest possible payment ratably for all creditors, since the protection of creditors is an interest of equity as well as law."

We find that on the bill, and on the evidence to which we cannot close our eyes, the court had jurisdiction.

The remaining question is whether the holders of old debentures, 96 per cent assenting, should be required to take new securities under the plan. The answer to this question depends on whether the proposed distribution of the new securities, as to character and quantity, is fair?

On the first question the appellants insist that holders of debentures, being "creditors, must be paid in full before any interest in the new company can be given to the stockholders of the old corporation", citing Northern Pacific Railway vs. Boyd, 228 U. S. 482, or, failing payment, there should be imposed against the property of the corporation liens for the full amount of their claims. As the appellants have no greater right to liens than to payment, we shall

limit our discussion to their claim for payment. If by the expression "paid in full" they mean that the debenture holders must be paid in cash, the Boyd case is not authority for that position. If they mean that, as non-assenting security holders, they cannot be required to take securities in the new corporation which fairly represent in value and preference securities they hold in the old corporation, Phipps vs. Chicago, R. I. & P. Ry. Co., 284 Fed. 945, 949 and the Boyd case itself (508) are authorities against them. St. Louis & San Francisco Ry. Co. vs. McElvain, 253 Fed. 123; P. R. Walsh Tie & Lumber Co. vs. Missouri Pacific Ry. Co., 280 Fed. 38, 44; Temmer vs. Denver Tramway Co., 18 Fed. (2d) 226.

[fol. 809] In the case of Northern Pacific vs. Boyd, where common stock in an old corporation was exchanged for common stock in a new one to the exclusion of creditors, the court held that a transaction in which stockholders are preferred to creditors is invalid. In the instant case holders of common stock in the old corporation will, under the plan, be given nothing in the new corporation. They will, however, be accorded the right to buy, for $1.00, a stock warrant for each three shares of old common stock they may own. One stock warrant gives them the right to buy, before July 1, 1941, one share of new common stock at $20. The stock warrant, when bought and issued, is not a security of the corporation; it is rather a chip giving a right to gamble. Thus holders of old common stock, who, seemingly, are not complaining, stand aside, leaving the holders of old debentures and old preferred stock as the only ones to be considered in determining whether the proposed distribution is fair.

The proposed plan of distribution was evidently made on the theory that the assets of the corporation, represented by new securities, belong to creditors rather than to the corporation, Coriell vs. Morris White, Inc., 54 Fed. (2d) 255, and belong particularly to senior creditors. It is manifest that the new corporation, as in the case of the old one, could not continue business in these times and survive periodical fixed interest charges. Earnings necessary to that end were not and, for a time, may not be forthcoming, hence the provision in the plan for new debentures with interest payable at 5 per cent when earned. New debentures—really income bonds without lien yet protected against mortgages by a provision for equality—will be given only

to holders of old debentures—$500 new for each $1,000 old. Stockholders, either preferred or common, will get none of them. So far, the substituted debenture is of the same grade as the old one, differing in interest rate and in time of interest payments.

In addition the holder of $1,000 old debentures will receive 5 shares (no par value) of 7 per cent new preferred stock. The interest rate of the new preferred stock is [fol. 810] higher than the interest rate of the old debenture but is payable only when earned, cumulative after an early date. As the new preferred stock is at present to be distributed only to holders of old debentures, there is little difference between them as to grade and preference. Then, finally, the holder of $1,000 old debentures will receive 20 shares of new common stock for what they may be worth.

Old preferred stock will be exchanged for new common stock, share for share. Holders of these securities apparently are not complaining. Certainly the holders of debentures cannot complain of a stock distribution that does not affect them.

And, finally, the new corporation will assume and pay the liabilities of the old corporation for taxes, wages, services and merchandise amounting to about $42,000.

We can understand why 96 per cent of the securityholders regard this distribution as fair, particularly as none of the appellants or anyone else has suggested any plan that is better or different. It is in our judgment fair and equitable.

The appellants, however, while declaring the plan of distribution unfair, are opposed to any plan because they say neither this one nor any other can hold out a promise of success. Therefore they insist upon immediate and complete liquidation of the corporation's assets. Notwithstanding the lack of purchasers and the probability of receiving nothing, they take the stand that they prefer, and in law have a right, to know and accept their fate now.

We are constrained to hold, however, that as against the rights of all other creditors they cannot in equity prevail.

In reaching this judgment we have brought into force no new principles of equity. We have simply applied to new facts old principles found in the zone in which the Boyd, Phipps, Luhrig Collieries, Pusey & Jones and Shapiro cases are landmarks.

There remains a matter raised on appeal by the International Heater Company, one of the intervening defend-

ants, which is not free from difficulties. It appears that [fol. 811] two of the companies entering into the merger held two-thirds of the capital stock of Lincoln Radiator Company, the other one-third being held by the International Heater Company, which stayed out of the merger. This one-third interest was acquired by the respondent corporation from the International for $100,000, of which $60,000 remains unpaid, evidenced by an equal face amount of promissory notes due serially at the rate of $20,000 per annum. These promissory notes and the corporation's outstanding unsecured debentures constitute its entire funded debt. The plan of reorganization covers an offer to the International of securities of the same character and number that are offered to holders of the old debentures. The International says, however, that it never held the corporation's debentures or other formal securities; that, as a creditor under the corporation's notes of hand, it is entitled to payment in cash and therefore has attacked what was done by the court below.

Our trouble has been in classifying the International Heater Company as a creditor, feeling that if properly classified its rights would be those of the class of which it is a member. Manifestly, it is not a secured or a preferred creditor. It is not a merchandise creditor or a creditor in respect to debts currently incurred in the usual course of the corporation's business. It neither sold the corporation merchandise nor rendered it service. It simply sold it shares of stock in another corporation. The notes which were received therefor are indicative that the payee, the International, is a general creditor, nothing more, nothing less. Being so, it stands on the same plane with holders of the debentures who, likewise, are general creditors. Therefore we can see no difference between the two in law and none in the consequences of the receivership. Yet, just here, the International takes the position that there is a difference between itself and holders of debentures, as general creditors, in that it did not buy debenture securities of the corporation with their attendant hazards but accepted its notes promising payment for property sold and assigned, and that not having bought into the corporation's diffi- [fol. 812] culties it stands outside of matters involving their solution and should be discharged with full payment of its claim in money. This distinction does not appeal to us as controlling, for the International voluntarily became a gen-

eral creditor of the corporation, is, as such, involved in its difficulties and can get out only by the means which the court has afforded general creditors who, without regard to the origin of their claims, have that status at the time the securities representing the corporation's assets are to be distributed.

All orders and decrees of the District Court here on appeal are affirmed.

[File endorsement omitted.]

[fol. 813] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 4959

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER CO., Appellants,

vs.

R. B. FLERSHEM et al., Reorganization Committee of National Radiator Corp., et al., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed March 24, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders and decrees of the said District Court, here on appeal, in this cause be, and the same are hereby, affirmed, with costs.

Philadelphia, March 24, 1933.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 814] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 5020

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER CO., Appellants,

vs.

ROBERT S. WATERS et al., Receivers of National Radiator Corp., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed March 24, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders and decrees of the said District Court, here on appeal, in this cause be, and the same are hereby, affirmed, with costs.

Philadelpia, March 24, 1933.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 815] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 816] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 5037

JOSEPHINE RAMSEY et al., Appellants,

vs.

NATIONAL RADIATOR CORP., Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

ORDER ASSIGNING JUDGES—Filed Dec. 14. 1932

And now, to-wit, this 14th day of December, A. D. 1932, it is ordered that Hon. Oliver B. Dickinson, District Judge for

the Eastern District of Pennsylvania, and Hon. William H. Kirkpatrick, District Judge for the Eastern District of Pennsylvania, be and they are hereby, assigned to sit in above case in order to make a full court.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 817] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1932

No. 5040

Edward J. Ramsey, Appellant,

vs.

National Radiator Corp., Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

Order Assigning Judges—Filed Dec. 14, 1932

And now, to-wit, this 14th day of December, A. D. 1932, it is ordered that Hon. Oliver B. Dickinson, District Judge for the Eastern District of Pennsylvania, and Hon. William H. Kirkpatrick, District Judge for the Eastern District of Pennsylvania, be, and they are hereby, assigned to sit in above case in order to make a full court.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 818] Minute entry of argument and submission, December 14, 1932, omitted in printing.

[fols. 819-832] Opinion omitted; printed side page 800 ante.

[fol. 833] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 5037

JOSEPHINE RAMSEY et al., Appellants,

vs.

RUDOLPH B. FLERSHEM et al., Reorganization Committee of National Radiator Corp., et al., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed March 24, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders and decrees of the said District Court, here on appeal, in this cause be, and the same are hereby, affirmed, with costs.

Philadelphia, March 24, 1933.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 834] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 5040

EDWARD J. RAMSEY, Appellant,

vs.

RUDOLPH B. FLERSHEM et al., Reorganization Committee of National Radiator Corp., et al., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed March 24, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders and decrees of the said District Court, here on appeal, in this cause be, and the same are hereby, affirmed, with costs.

Philadelphia, March 24, 1933.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 835] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 836] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 62

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 837] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 63

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 838] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 64

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 37,659, 37,660, 37,661. U. S. Circuit Court of Appeals, Third Circuit. Term No. 62. First National Bank of Cincinnati and International Heater Company, *petitioners*, vs. Rudolph B. Flershem, Charles O. Cornell, John H. Walters, et al., etc. Term No. 63. First National Bank of Cincinnati and International Heater Company, petitioners, vs. Rudolph B. Flershem, Charles O. Cornell, John H. Walters, et al., etc. Term No. 64. Amy Arzt and Josephine Ramsey, petitioners, vs. Rudolph B. Flershem, Charles O. Cornell, John H. Walters, et al., etc. Petitions for writs of certiorari and exhibits thereto. Filed May 12, 1933. Nos. 62, O. T., 1933. 63, O. T., 1933. 64, O. T., 1933.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, ET AL., ETC.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, ET AL., ETC.

No. 64

AMY ARZT and JOSEPHINE RAMSEY, Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, ET AL., ETC.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

STIPULATION TO CORRECT DIMINUTION OF THE RECORD

It is hereby stipulated and agreed, by and between counsel for all parties to the above-captioned causes, as follows:

1. Copy of the "First Report of Robert S. Waters and William G. Heiner, Receivers of National Radiator Corporation", duly certified by the Clerk of the District Court of the United States for the Western District of Pennsylvania, may be filed by counsel for the respondents Flershem, Cornell, et al., as the Reorganization Committee, etc., with the Clerk of the Supreme Court of the United States as an Original Exhibit in and as part of the Record of said causes in the Supreme Court of the United States.

2. Copy of the "Statement Filed by Receivers Pursuant to Section 54 in Article XV of the Final Decree of Sale", duly certified by the Clerk of the District Court of the United States for the Western District of Pennsylvania, may be filed by counsel for the respondents Flershem, Cornell, et al., as the Reorganization Committee, etc., with the Clerk of the Supreme Court of the United States as an Original Exhibit in and as part of the Record of said causes in the Supreme Court of the United States.

3. Copies of petition of First National Bank of Cincinnati and International Heater Company for a stay, and of order thereon, filed and made in the United States Circuit Court of Appeals for the Third Circuit, the copies of said petition and order being duly certified by the clerk of said court, may be filed by counsel for the respondents Flershem, Cornell, et al., as the Reorganization Committee, etc., with the Clerk of the Supreme Court of the United States and may be printed by said Clerk (without the exhibits attached to said petition, which have already been printed by said Clerk elsewhere in the Record) and may be added by him to the printed Record in the above-captioned causes.

Dated September 26, 1933.

Horace F. Baker, Counsel for First National Bank of Cincinnati, Petitioner. James F. Hubbell, Counsel for International Heater Company, Petitioner. Chas. H. Sacks, Counsel for Amy Arzt and Josephine Ramsey, Petitioners. Maynard Teall, Counsel for Rudolph B. Flershem, Charles O. Cornell, John H. Waters, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Respondents. Grandin Tracy Vought, Counsel for Bankers Trust Company, Trustee, Respondent. H. S. Endsley, Counsel for National Radiator Corporation (Delaware), Respondent. Maynard Teall, Counsel for National Radiator Corporation (Maryland), Respondent. Maynard Teall, Counsel for Robert S. Waters and William G. Heiner, Receivers, Respondents. Maynard Teall, Counsel for Carl E. Resley and G. Franklin Ludington, Respondents.

[Endorsed:] Supreme Court of the United States. Nos. 62-64, October Term, 1933. First National Bank of Cincinnati, International Heater Company, Amy Arzt, and Josephine Ramsey, Petitioners, vs. Rudolph B. Flershem, Charles O. Cornell, John H. Waters, et al., etc. Stipulation to correct diminution of the record. Maynard Teall, 747 Union Trust Building, Pittsburgh, Pennsylvania.

Copy

IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. —. In Equity. No. 2558 in the District Court of the United States for the Western District of Pennsylvania

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

versus

NATIONAL RADIATOR CORPORATION, Defendant

From Which Appeal Has Been Entered in This Court, No. 4959, First National Bank of Cincinnati et al. vs. Flershem et al.

PETITION FOR STAY OF PROCEEDINGS IN THE DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

To the Honorable the Judges of the Circuit Court of Appeals for the Third Circuit:

The petition of First National Bank of Cincinnati, Ohio, by Ehrich, Royall, Wheeler & Walter of New York City and Baker & Watts of Pittsburgh, Pa., its counsel, and International Heater Company of Utica, New York, by Miller & Hubbell of Utica, New York and Alter, Wright & Barron, of Pittsburgh, Pa., its counsel, intervening defendants in the above entitled equity proceedings in the District Court of the United States for the Western District of Pennsylvania, respectfully represents:

First. Said equity proceedings were initiated October 5, 1931 by the filing of a bill of complaint, which was answered by the defendant, National Radiator Corporation under date of October 9, 1931. On the latter date a decree was entered appointing Robert S. Waters and William G. Heiner Receivers.

Second. By order entered March 3, 1932 petitioner, First National Bank of Cincinnati, was allowed to intervene as a party defendant, and by a similar order, entered March 31, 1932, petitioner, International Heater Company was also allowed to intervene as a party defendant.

Third. By an order entered January 9, 1932 Bankers Trust Company, trustees, was permitted to intervene as a party plaintiff, and on the same date said intervener filed its intervening petition joining in the prayer of the original bill of complaint.

Fourth. After a hearing held by his Honor Judge Gibson on March 3, 1932, a so-called final decree of sale of the assets and properties of the National Radiator Corporation was filed and entered May 31, 1932.

Fifth. By said decree of sale the place for holding the same was fixed at New Castle, Pennsylvania, and the time as August 8, 1932; the complainants in the equity suit were authorized to become bidders at said sale and to use deposited debentures in payment of their bid, and an upset price was fixed in said order of sale at $2,500,000.00.

Sixth. By an order entered in said District Court under date of July 23, 1932 an appeal was allowed these petitioners from said order of sale, and appellants were directed to enter a bond in the sum of $1,000.00, conditioned for the payment of costs on appeal. Simultaneously a citation was issued returnable August 24, 1932. Accompanying the petition for appeal were assignments of error. On August 2, 1932 petitioners' bond on appeal was approved by the Court and ordered filed. Said appeal has been docketed by the Clerk of this Court as appeal No. 4959 and is on the printed argument list of this Court for the October Term.

Seventh. Notwithstanding the taking of said appeal, the Receivers held their sale at New Castle, Pennsylvania on

August 8, 1932 and sold the property of the National Radiator Corporation, including cash, securities and receivables, to representatives of the complainants for the sum of $2,550,000.00. Said Receivers filed their return of sale. Prior thereto, to wit, on July 29, 1932, complainants filed their petition for approval of Plan and Agreement, dated February 11, 1931, for the reorganization of National Radiator Corporation. To said return of sale these petitioners filed objections in writing and to said Petition for Approval and Answer. A hearing on said matters was held by his Honor Judge Gibson on August 18, 1932, at which testimony was taken.

Eighth. At the time of the entry of the decree of sale, as aforesaid, to wit, on May 31, 1932, his Honor Judge Gibson filed an opinion, copy of which is hereto attached, made part hereof and marked Exhibit "A". After the hearing on August 18, 1932 his Honor Judge Gibson entered a decree confirming sale and approving deed. Said decree was entered September 8, 1932, and accompanying it was filed a Memorandum, copy of which is hereto attached, made part hereof and marked Exhibit "B".

Ninth. Both the said decree of sale of May 31, 1932 and the decree confirming sale of September 8, 1932 are bulky printed documents of about one hundred pages each, and petitioners pray to be permitted to file copies thereof concurrently with the presentation of this petition.

Tenth. Petitioner First National Bank of Cincinnati, Ohio is the owner of 68 of the $1,000 6½% debentures issued by National Radiator Corporation under date of August 1, 1927, of a total issue of $12,000,000 authorized. The banker's circular describing this issue of debentures had attached thereto a balance sheet of said corporation showing total assets and liabilities in the amount of $26,192,261.72. The tentative balance sheet of the corporation as of December 31, 1930, as set forth in the Plan and Agreement dated February 11, 1931, which was attached to complainants' Bill of Complaint, show total assets and liabilities of $19,434,548.08.

Eleventh. According to the said Plan and Agreement dated February 11, 1931, the new corporation, now identi-

fied as National Radiator Corporation, a Maryland corporation, is to issue securities as follows:

(1) $5,500,000 of 15-yr. 5% debentures, interest payable semi-annually, but payable only out of the new company's net earnings.

(2) 55,000 shares of $7 preferred stock, without par value, preferred both as to assets and dividends, entitling the holders thereof to receive on voluntary liquidation $115.00 per share, and on involuntary liquidation $100.00 per share, plus in each case accumulated and unpaid dividends.

(3) 400,000 shares of common stock, without par value.

Twelfth. It is further provided in said Plan and Agreement that present holders of debentures are to receive for each $1,000 principal amount of deposited debentures,

$500 principal amount of New Debentures, and
5 shares of New Preferred Stock, and
20 shares of New Common Stock.

It is also provided that present holders of preferred stock will receive for each share of deposited Preferred Stock, one share of New Common Stock. Holders of common stock are given the right to receive a stock warrant to purchase one share of New Common Stock for each three shares of deposited common stock, but requiring payment to the depositary of $1.00 in cash in respect of each share of New Common Stock covered by such stock warrant.

Thirteenth. The assets about to be acquired by the new corporation under the aforesaid decrees of the Court below include almost $2,000,000 in cash and Government securities. No appraisement was made by the Court below of the physical properties included in the sale. Receivers' accounts receivable amounted to $854,000 after substantial reserves. Inventory (chiefly created by the receivers) amounted to $1,654,000 at cost; real estate consisting of numerous plants, warehouses, dwellings, etc., situated in five or six different states appears upon the receivers' inventory at $6,635,000. For these assets the Court fixed an upset price of $2,500,000, for the purpose of effectuating the plan of reorganization.

Fourteenth. Petitioner, International Heater Company of Utica, New York is a creditor of said National Radiator Corporation, holding its three promissory notes, dated December 31, 1928, payable respectively three, four and five years after date.

Fifteenth. Petitioners expect to be able to show to this Court in the presentation of their pending appeal and in such other appeal from the said "Decree confirming sale and approving deed" as may become necessary, both that the said Plan of Reorganization is unfair and inequitable to petitioners and that the carrying out thereof in the manner accomplished by the decrees of the Court below deprives petitioners of their ratable proportion or share of the fair realizable value of the asssets of their debtor corporation. Petitioners are further advised and believe that their rights can be saved only by normal liquidation in equity, or by retention of the assets in the hands of the Court below until the rights of appellants therein are finally determined by this Court.

Sixteenth. Prior to the entry by the Court below of the decree of September 8, 1932 petitioners requested said Court to direct its Receivers to withhold delivery of the title deeds until after petitioners' appeal had been disposed of by this Court. This request was made in open court at the hearing held on August 18, 1932. The request was ignored. Petitioners subsequently on September 13, 1932 presented to said Court a Motion requesting a stay of proceedings, which said Motion was refused by his Honor Judge Gibson. Copy of said Motion and the order thereon are hereto attached, made part hereof and marked "Exhibit C".

Seventeenth. Petitioners are advised and believe and therefore aver that the provisions of the Supersedeas Act of February 18, 1875 (28 U. S. C. A., Sec. 874) and the first paragraph of Rule 13 of this Court do not require the filing by petitioners of a bond, the penalty of which is fixed by the contemplated loss which further continuation of this receivership, pending disposition of this appeal, may involve or occasion. These petitioners are not defendants in any judgment of the Court below and are creditors of equal rank with the complainants in the case. They are further

advised that the lodging of their appeal was effective to deprive the Court below of jurisdiction to make any orders other than to safeguard and protect the property and assets under the control of said Court.

Eighteenth. In view of the expressed declaration of counsel for the Receivers and counsel for the Reorganization Committee that it is proposed to carry out the sale as soon as it can conveniently be done, petitioners are making this application at the earliest possible date, in order that the title to the assets of the National Radiator Corporation, defendant, may not be improvidently transferred or disposed of to the prejudice of the rights of your petitioners. Notice of this application has been given counsel for the Receivers and to counsel for the Reorganization Committee. Petitioners expect to have ready for the Court a memorandum of authorities.

Wherefore petitioners prav that your Honorable Court issue such appropriate writ of prohibition or of mandamus, directed to the Honorable Robert M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania, in order that thereby the assets of this receivership be held intact until the determination by this Court of the pending, and possibly an additional, appeal by these petitioners from the aforesaid decrees of the Court below. And petitioners further pray that this Court grant them such other relief as may be suitable and necessary in the premises and as may be warranted by the power and jurisdiction residing in this Court pursuant to the Act of Congress of March 3, 1911, being Judicial Code Sec. 262 (28 U. S. C. A., Sec. 377), or any other Act confering jurisdiction upon this Court to act herein as prayed for.

First National Bank of Cincinnati, Ohio, by Ehrich, Royal, Wheeler & Walter, Baker & Watts, Its Counsel. Sidney J. Watts, of Counsel. International Heater Company, by Miller & Hubbell, Alter, Wright & Barron, Its Counsel. Gifford K. Wright, of Counsel.

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

vs.

NATIONAL RADIATOR CORPORATION, Defendant

OPINION—Filed May 31, 1932

GIBSON, District Judge:

The plaintiffs compose a committee for the reorganization of the defendant company. The defendant company admitted the allegations of plaintiffs' bill of complaint and consented to the relief sought therein. The Bankers Trust Company, a corporation of the State of New York, Trustee under an issue of debentures by the defendant, has intervened as a party plaintiff, and the First National Bank of Cincinnati, a holder of debentures to the amount of $68,000, and the International Heater Company, a general creditor, have intervened as party defendants. The plaintiffs represent holders of more than 95% of the debentures issued by the defendant company. The total of these debentures outstanding when the bill of complaint was filed, interest uncounted, is $10,705,000. The general indebtedness of the defendant is comparatively very small.

The bill of complaint prays, inter alia, the sale of the defendant's properties situated in ten Districts. The only intervening defendant appearing at the trial in opposition to the prayers of the bill was the First National Bank of Cincinnati. Its opposition was forcibly presented, but analysis does not show its contentions to be forceful. By implication rather than specific charge, it alleged improper collusion between the original plaintiffs, the intervening

plaintiff and the Radiator Corporation, defendant. In so doing it based its contention largely upon the fact that the defendant had more than sufficient funds on hand to pay the interest upon the debentures at the time it defaulted in the payment of it. It did not undertake to deny that the defendant company had lost in operation about $1,500,000 for each of the last three years preceding the filing of the bill of complaint, or that it was moving toward inevitable bankruptcy when the instant suit was instituted. The most tangible effort of the intervening defendant was put forth in an effort to have a large "upset" price fixed by the Court in ordering a sale of the defendant company's properties. It also urged that a sale should not be ordered until the depression period had passed. As to the contention last mentioned, it is possible, and we hope, that conditions will improve in the near future, but in view of the fact that the expenses of the receivership are very heavy, and the operation of the defendant company is at a considerable loss, we feel it would be improper to undertake to exercise a gift of prophecy which has not actually been conferred upon us. Such attempt might well result in greater loss.

In our opinion, the evidence has disclosed no fraudulent collusion between the plaintiffs and defendants. It does show, we think, a very present need for reorganization of the Radiator Corporation, and the means suggested in the bill seem to us to furnish a reasonable chance to avoid further loss by creditors. The holders of a small proportion of the company's indebtedness do not agree with this opinion, and such creditors are entitled to consideration by the Court. This does not mean that we should overturn the plans of the great majority of the creditors to save some part of their claims unless those plans unfairly encroach upon the rights of the minority claimants. In the instant case we discern no such encroachment. All the creditors were given the opportunity to participate in the plan of the majority. The small minority did not want to participate in the reorganization plan of the majority. Under such circumstances the rights of the minority creditors seem plain. They are entitled to recover the amount of the indebtedness to them by judicial sale of the properties of the defendant, or, in event those properties are fairly sold for less than the total indebtedness of defendant, for that proportion of the net proceeds of the sale which their claims bear to the total indebtedness.

The defendant has defaulted in the payment of interest upon its bonds, and the sale of its properties is inevitable. All who appeared at the hearing agreed upon this proposition, although differing as to the proper time for the sale and the minimum price, or prices, of the properties at which the Court would confirm the sale. The difference at the hearing between the creditors desiring reorganization and the single creditor urging complete liquidation was wide. The latter pointed to the appraisement of the various component properties at the time the combination of plants was formed in 1926, and demands that an "upset" price of over $10,000,000 be fixed as the minimum confirmation price. The appraisement was upon operating plants and based upon replacement costs as of December 31, 1926. This appraisal is of little value in the determination of liquidation value at present, when only two of the eight plants in the combination are operating, and those two not fully. The intervening defendant has introduced no witness to contradict the witnesses of the plaintiffs who have testified as to present liquidating values. Its claim is so plainly extravagant as to make it worthy of little consideration. The witnesses of the plaintiffs have fixed the liquidating value of the assets of the defendant company at a little less than $2,500,000, and we think this amount reasonably represents a minimum price for the properties of defendant at which a sale of them might be confirmed by the Court. The allocation of this amount among the various properties is set forth in the decree.

The intervening defendant's counsel have cited Northern Pacific Railway Company v. Boyd, 228 U. S. 482, in an attack upon the reorganization plan set forth in the bill. That case holds that no reorganization plan may allow stockholders to exchange their shares in the old company for shares in the new, unless the rights of general creditors have been protected. The instant case is not one wherein the stockholder has been benefited at the expense of general creditors. In the proposed reorganization of the present case the creditors are given the senior securities of the new company. Common stockholders of the old company may obtain stock in the new, but only upon condition of payment of a cash assessment. In view of the fact that the properties are by the decree ordered to be sold, this contention is somewhat immaterial. The creditors who have

adopted the reorganization plan are satisfied with the provisions, and those who have not accepted it will have their rights protected by the sale.

Findings of Fact

The findings of fact are as set forth in paragraphs 1 to 28, inclusive, of the decree hereinafter set forth, now referred to and made part hereof.

Conclusions of Law.

The plaintiffs are entitled to a decree ordering the sale of the assets and properties of the defendant company.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

vs.

NATIONAL RADIATOR CORPORATION, Defendant

MEMORANDUM—Filed 9/8/32

GIBSON, District Judge:

Prior to the order for sale in this matter, this Court heard creditors of the defendant corporation, who objected to the organization scheme proposed by the plaintiffs. Upon consideration of the reorganization proposed, subsequent to that hearing, we felt that the obligations of the corporation were considerably greater than its tangible assets and that the reorganization proposed was proper and worthy of the approval of the Court. After the sale of defendant's properties was made and exceptions filed to the Receivers' re-

turn, we again heard creditors objecting to the reorganization and exceptions to the confirmation of the sale. Upon consideration of the testimony offered at such hearing, we have not been led to a change of opinion in respect to the good faith of the reorganization scheme, and the power and duty of the Court to approve it, as expressed in a prior opinion under this number, and also in opinion in the case of Lily Clapier v. Rudolph B. Flershem, et al., and National Radiator Corporation, at No. 2597 In Equity.

The exceptions relating to the conduct of the sale are of no weight and must be dismissed.

EXHIBIT "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

versus

NATIONAL RADIATOR CORPORATION, Defendant

MOTION TO STAY PROCEEDINGS, ORDER AND EXCEPTION

And now, to wit, this 13th day of September, 1932, come the First National Bank of Cincinnati, Ohio, by Ehrich, Royall, Wheeler & Walter and Baker & Watts, their counsel, and International Heater Company, of Utica, New York, by Miller & Hubbell and Alter, Wright & Barron, their counsel, interveners, and representing to the court that they have already in the thirteenth objection to confirmation of sale urged this court to postpone and hold in abeyance confirmation of the sale reported by the Receivers, which said objection was overruled by the Court in its order of September 8, 1932, now move the Court to direct said Receivers to refrain from consummating said sale by the delivery of deeds or other instruments of conveyance or

assignment until after the decision by the Circuit Court of Appeals for the Third Circuit of the appeal already taken, as well as of a further appeal from the order of confirmation which may be taken by the undersigned interveners, or to provide some other method as by the requirement of a bond from the complainants in this case, whereby the interests of these interveners in and to the assets now within the custody and control of the Court may be fully and completely protected, pending disposition of said appeal or appeals.

First National Bank of Cincinnati, Ohio, by Ehrich, Royall, Wheeler & Walter, Baker & Watts, Their Counsel. International Heater Company, by Miller & Hubbell, Alter, Wright & Barron, Their Counsel.

ORDER

And now, to wit, this 13th day of September, 1932, the foregoing Motion being presented in open court, upon consideration thereof it is ordered that the same be and it is hereby refused.

EXCEPTION

To which action of the Court said moving parties except and at their instance exception is allowed and bill sealed.

(Sd.) Robert M. Gibson. (Seal.)

Endorsements: 4959. Petition for Stay of Proceedings in the District Court for the Western District of Pennsylvania. Rec'd & Filed Sept. 15, 1932. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Petition for Stay of Proceedings in the case of First National Bank of Cincinnati et al., Appellants, vs. Rudolph B. Flershem et al., etc., Appellees, No. 4959, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 26th day of September, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the United States the one hundred and fifty-eighth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1932

No. 4959

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, Appellants,

vs.

RUDOLPH B. FLERSHEM et al., Reorganization Committee, etc., of the National Radiator Corporation, Appellees

On Petition to Stay Execution of Sale

And now, to wit September 15, 1932, motion having been made to grant a stay of the proceeding in the Court below pending the decision of this Court on appeal, and it appearing the Judge below refused to make such stay, and it further appearing that in the application to this Court and the application to the Court below the movers of the motion stated they would give no bond of indemnity whatever, and the parties having been fully heard, the motion is denied.

Joseph Buffington, Circuit Judge.

Endorsements: 4959. Order Denying Motion for Stay, etc. Rec'd & Filed Sept. 15, 1932. Wm. P. Rowland, Clerk.

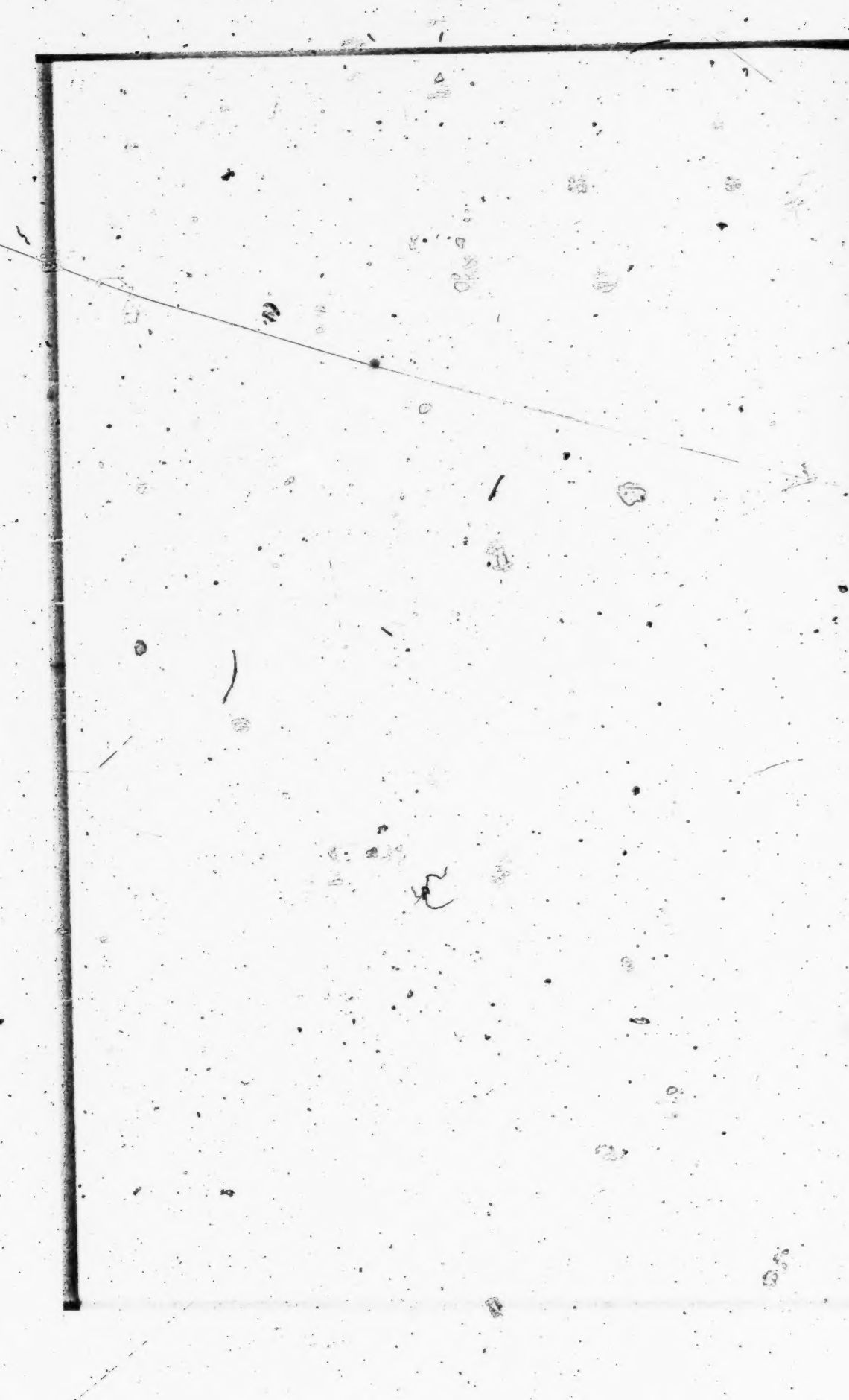
UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby cer-

tify the foregoing to be a true and faithful copy of the original Order Denying Motion for Stay, etc., in the case of First National Bank of Cincinnati and International Heater Co., Appellants, vs. Rudolph B. Flershem et al., Reorganization Committee, etc., of the National Radiator Corp., Appellees, No. 4959, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 11th day of September, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the United States the one hundred and fifty-eighth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)



Nos. 962 - 963

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,
Petitioners (Appellants Below),

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of NATIONAL RADIATOR CORPORATION and BANKERS TRUST COMPANY, Trustee, NATIONAL RADIATOR CORPORATION (Delaware), NATIONAL RADIATOR CORPORATION (Maryland), ROBERT S. WATERS and WILLIAM G. HEINER, Receivers, CARL E. RESLEY and G. FRANKLIN LUDINGTON,
Respondents (Appellees Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

RALPH ROYALL,
JAMES F. HUBBELL,
HORACE F. BAKER,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1932

No.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners (Appellants Below),

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of NATIONAL RADIATOR CORPORATION and BANKERS TRUST COMPANY, Trustee, NATIONAL RADIATOR CORPORATION (Delaware), NATIONAL RADIATOR CORPORATION (Maryland), ROBERT S. WATERS and WILLIAM G. HEINER, Receivers, CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents (Appellees Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles E. Hughes, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

First National Bank of Cincinnati and International Heater Company, the above-named petitioners, respectfully pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Third Circuit filed on the 24th day of March, 1933, affirming the final decree of sale filed in the United States District Court for the Western District of Pennsylvania on the 31st day of May, 1932, and the decree confirming the sale and approving the Plan of Reorganization filed therein on the 8th day of September, 1932 in the Federal Equity suit brought in that Court entitled "Rudolph B. Flershem, et al, as the Reorganization Committee, etc., Complainants, against National Radiator Corporation, Defendant."

STATEMENT

This is a suit brought by the Reorganization Committee as complainants in the United States District Court for the Western District of Pennsylvania for the purpose of effectuating a plan of reorganization of National Radiator Corporation (the defendant). The suit resulted in the making of a perfunctory judicial sale in a manner studiously designed to effectuate a transfer of all of the assets of the corporation to the nominee of the Reorganization Committee for the sum of $2,500,000., although in 1927 the same interests as those sponsoring the reorganization represented the corporate assets as

having a value of approximately $25,000,000. This representation was made in connection with the sale at that time of $12,000,000. of debentures.

The petitioner First National Bank of Cincinnati is the owner of $68,000. in face amount of such debentures which were acquired by it at the time of their issue at the issue price of $1,000. a debenture.

The petitioner International Heater Company is the owner of $60,000. of corporate notes issued to it by the corporation on account of payment of the purchase price for its interest in property acquired from it by the corporation in 1928. These notes became due serially at the rate of $20,000. per annum.

The debentures were unsecured. There were no other creditors who had security. All the creditors were unsecured general creditors.

The suit had its genesis at a directors meeting of National Radiator Corporation held on the 31st day of January, 1931, at which it was resolved to default upon the debenture interest due February 1, 1931 and to ask the complainants, who include the two ranking officers of the corporation, to act as a Reorganization Committee. It was also resolved that the corporation should undertake to pay the expenses of the Reorganization Committee. (R., pp. 750-1) A Plan of Reorganization dated February 11, 1931 for the benefit of debenture holders and preferred and common stockholders was immediately promulgated. After obtaining the deposit of a large majority of the debentures and preferred and common stocks, the Committee filed this suit as complainants on October 5th, 1931. (R., p. 10) The answer of the complainants to the intervening petition of First National

Bank of Cincinnati admits "that they filed the bill of complaint in this cause as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931." (R., p. 150) The bill of complaint prayed "that the properties and assets and business of the defendant may be ordered to be sold as an entirety." (R., p. 20) The answer of defendant National Radiator Corporation to the bill of complaint "admits the truth of the allegations therein contained, joins in the prayers thereof, and consents to the appointment of a receiver or receivers as therein prayed for." (R., p. 93) Upon the filing of this bill of complaint and this answer the Court, without legal notice to anyone, on the 9th day of October, 1931 made a decree completely sequestering the assets of the corporation in the Court's hands and appointing Robert S. Waters, the Vice President and General Manager of the corporation, and William G. Heiner as Receivers and enjoining suits. (R., pp. 95-101)

The National Radiator Corporation was organized in August 1927 to effectuate a merger of six corporations with far-flung plants located in nine states engaged in the business of manufacturing boilers, radiators and similar articles. A public issue of $12,000,000. of unsecured debentures was made in August 1927 by the respondent Bankers Trust Company as the banking house of issue for the purpose of effectuating this merger. It would perhaps be more accurate to say that the merger was for the purpose of effectuating the issue. The Bankers Trust Company is also the trustee under the indenture relating to the debentures and also served in the third capacity of depositary under the Plan of Reorganization dated February 11, 1931. The banker's cir-

cular upon which the debentures were sold in 1927, showed assets of $26,192,261.72 and liabilities of $1,478,061.72 other than the liability upon the $12,000,000. of debentures and upon preferred and common shares of stock which had a stated liability of $11,500,000. (R., pp. 405-7.)

The operations of the corporation for the full years of its operation after the merger became effective and until the receivership, that is to say, the years 1928, 1929 and 1930, showed losses after depreciation of over $1,200,000. in each of those years and aggregate losses for the three years of approximately $4,000,000. after interest on the debentures and of approximately $2,000,000. before such interest. (R., p. 209) This, although as is well known, 1928 and 1929 were banner years. The business as an entirety was a demonstrated failure.

In February, 1931 at the time the corporation defaulted on the semi-annual interest payment upon the debentures and at which time the Reorganization Committee was organized and the Plan of Reorganization, dated February 11, 1931, was promulgated, the corporation had current assets of $5,054,007.30 of which $1,701,899.94 was cash. There were then other assets sufficient to bring the total up to $19,434,548.08. The only presently payable liabilities, other than the debenture interest then about to fall due, were $46,787.60 of accounts payable. (R., pp. 51-2)

In the spring of 1932 the respondents, without notice to the creditors, submitted to the District Court the final decree of sale above referred to which was signed and filed in that Court on May 31, 1932. (R., p. 420) The three ranking officers of the corporation, Mr. John

H. Waters, President (and chief stockholder), Mr. Rudolph B. Flershem, Chairman of the Board, and Robert S. Waters, Vice President and General Manager (and the President's son), the first two of whom are also members of the Reorganization Committee, were placed upon the stand by the respondents to testify as to upset price. They wanted to buy the property as cheaply as they could. They testified that about $2,300,000 was an appropriate price. (R., pp. 232, 343) The receiver Heiner, who may be said to have been the Court's receiver, was also called by counsel for the Reorganization Committee to testify to the same effect. (R., p. 381) Both of the receivers, as well as the Reorganization Committee, were represented by the same counsel. (R., p. 120).

The decree submitted and signed provided for the sale at New Castle, Pennsylvania, of the property as an entirety, including cash, Liberty bonds, accounts receivable, receivers' inventory, plants and machinery, numerous warehouses, numerous dwellings and an office building and an apartment house situated in nine different states. A study of the provisions of the decree in this respect will show that it was studiously designed to effectuate a perfunctory judicial sale for the purpose of accomplishing the Plan rather than a real liquidation for the purpose of bringing about the best possible yield to the trust in the Court's hands. (R., pp. 445, 470, 474.)

The Court fixed $2,500,000. as the upset price for such sale.

At the time of this hearing the current assets to be the subject of this sale consisted of the following:

Cash	$852,096.29
United States Certificates of Indebtedness	980,000.00
Accrued interest thereon	6,124.97
Bank Certificates of Deposit	50,000.00
Cash surrender of Life Insurance	22,900.00
New York State Bonds	18,686.33
Accounts Receivable	858,992.41
Inventory	1,634,905.25
Total	$4,423,705.25

In addition to this, there were plants and machinery carried in the receivers' inventory after full depreciation at $6,635,842.84. In addition thereto, there were the rights as creditor, majority stockholder and equitable owner of the rest of the stock of the Steel Boiler Company. In addition there were the patents, trade-marks and trade-names which with good-will were carried by the corporation at over $6,000,000. as well as other valuable items. (R., pp. 381-382)

The Court took no measures at all to assure itself that the sale conducted under such decree and at such an upset price would yield as much as would the holding in the hands of the receivers of the cash, Liberty bonds and receivables and the careful and business-like sale of the inventory and machinery and plant equipment and of the very numerous pieces of real estate in separate lots and the taking of appropriate steps to effectuate a recovery and liquidation of other assets hereafter mentioned. The Court did not secure an appraisal and acted only upon the so-called opinion of the purchasers who wanted to buy the property as cheaply as they could.

The petitioner First National Bank of Cincinnati, which at the time of the hearing was making an application to intervene (R., p. 3), became apprised of the application for the final decree of sale and was permitted to cross-examine the above-mentioned witnesses. This party besought the Court to take suitable measures in order to investigate the value of the properties and the best method of realizing upon the fund for the protection of this intervenor and of each and every other creditor of the trust fund in the hands of the Court, but this the Court refused to do.

The petitioner International Heater Company was not heard at all upon the application for the decree of sale and learned only by chance of the decree after it had been signed. It thereafter intervened (R., p. 200) and, together with the petitioner First National Bank of Cincinnati appealed to the Circuit Court of Appeals from the final decree of sale dated May 31, 1932 (R., p. 490) These petitioners also joined in contesting the propriety of making the further decree dated the 8th day of September, 1932, approving the Plan and directing the transfer of the assets (the trust fund) from the custody of the Court to the new corporation, and joined in appealing from that decree. (R., p. 712)

The Reorganization Committee (complainants) acted on behalf of debenture holders, preferred stockholders and common stockholders. The Plan provided that the rights of the debenture holders as creditors should be cut in half and that their right to receive interest should depend upon earnings. At the same time, the Plan preserved in the preferred stockholders a substantial share in the assets of the corporation without imposing any

condition by way of contribution of new capital, or otherwise; in other words, gave them a "free ride." The Plan also provided that the common stockholders, upon the payment of the nominal sum of One dollar in respect to each three shares of old common stock, might acquire a warrant evidencing their right to buy stock of the new corporation at a fixed price at any time within the next ensuing twenty years. (R., p. 61) The Plan also provided that the Committee should have the discretion to pay certain ordinary creditors in full in cash (R., pp. 65-6); and, in carrying out the Plan, all the miscellaneous general creditors were paid in full in cash. (R., p. 648-9)

As to these petitioners, however, they were permitted to receive only the securities of the new corporation as arranged by the Committee or be relegated to the receipt of such dividend as would follow from such upset price as the complainants might be able to induce the Court to fix after the deduction therefrom of the amount of such allowances to the complainants and the receivers and the Trustee and their respective counsel as the Court might be induced to grant. (R., pp. 456-458) The decree contains a provision reserving out of the cash included in the sale the sum of $300,000. to be used for such and similar purposes. (R., p. 453)

In 1927 the respondents represented the assets to be worth $25,000,000. In 1931 they carried them at $19,000,000. In 1932 they passed them through the Court to their new corporation with a capital structure of $16,000,000. (R., p. 56, 58-60) But while the assets constituted a trust in the Court's hands, they said they were worth but $2,500,000. The Courts

below adopted their views. What is there in the judicial touch which renders assets comparatively valueless when constituting a trust although of great value at every other moment?

One of these petitioners brought out upon the cross-examination of respondents' witnesses that there had been developed in laboratories of the corporation, by officers and employees of the corporation, and at the expense of the corporation, a new type of steel boiler, and that the capital for financing the manufacture and sale of these special boilers was also furnished by the corporation; also, that the patents and devices were put into another corporation called the "National Steel Boiler Company," but that only a bare majority of this stock was issued to defendant corporation, the rest of it being issued to some of its officers and employees who claim to own it in their individual rights. (R., pp. 299-303) As to this new invention, it was stated in a printed circular addressed by the Reorganization Committee to the debenture holders that the corporation "has developed new and improved products of great promise including, among others, steel boilers." (Record, pp. 529-530) That petitioner besought the Court to take appropriate action to have this transaction, which on its face seemed fraudulent, undone in order that this apparently valuable asset might be recovered for the benefit of the creditors. The Court below, as well as the Circuit Court of Appeals, refused to make any such provision but decreed a sale of all the assets as an entirety to the nominee of the Reorganization Committee with the result that the old interests have acquired the rights of the corporation and have thus been put in a position to

give themselves immunity for their seemingly fraudulent acts in this important transaction.

The further result of the decrees is to continue the business in the hands of the same management under whose charge it was a demonstrated failure.

Upon the joint appeal to the Circuit Court of Appeals by these petitioners from these decrees of the United States District Court of the Western District of Pennsylvania the Circuit Court of Appeals of the Third Circuit made a decision dated the 24th day of March, 1933 affirming them.

In the opinion handed down by the District Court and in the opinion also handed down by the Circuit Court of Appeals, both Courts refrained from discussing the main point urged before each of such Courts by these petitioners, that, the Court having sequestered the whole of the debtor's property for the protection of creditors and enjoined suit, the fund constituted a trust in the hands of the Court, and that each and every creditor had a fundamental right to the due administration by the Court of such trust in such manner as to provide the greatest possible payment to each of the creditors.

THE QUESTIONS PRESENTED:

(1) Did not the District Court, having sequestered all of the assets of National Radiator Corporation in its hands and having prohibited by injunction all creditors from pursuing their legal rights, become charged with a trust to fairly and duly administer the fund for the benefit of each and every creditor, or, in other words, did not the Court become a "judicial trustee" of the fund thus sequestered in its hands?

(2) Did not such Court owe the duty to each and every creditor to see to it that the fund was administered in such manner as to effect a recovery and liquidation of the assets of the debtor corporation so as to provide the greatest possible payment to the creditors and to each and every one of them?

(3) Did not the Court violate the rights of these petitioners in signing the final decree of sale dated May 31, 1932 proposed by the Reorganization Committee, with provisions studiously designed to bring about merely a transfer of the corporate assets to them for the purpose of effectuating the Plan of Reorganization and with an upset price of $2,500,000. for all of the assets of this corporation, without investigation by the Court as to the best means of liquidating such assets so as to produce the greatest possible yield to each and every creditor, and acting without inventory or appraisal, and merely upon the suggestion of the purchasers as to the price at which they should be permitted to acquire the trust assets.

(4) May a Federal court of equity in such a proceeding properly make a decree of sale for the purpose of effectuating a Plan of Reorganization which reduces the rights of the creditors as such in the assets of the corporation, while preserving an interest for its preferred stockholders without the requirement of a contribution of new capital by such stockholders as the condition of the preservation of such interest?

(5) May a Federal court of equity in such a proceeding properly decree a sale of all the corporate assets for the purpose of effectuating a Plan of Reorganiza-

tion under which some of the general creditors are paid in full in cash out of the assets of the corporation, while others are relegated to a dividend based upon an upset price fixed by the Court to yield approximately 15c to 20c on the dollar?

(6) May a Federal court of equity in such a proceeding decree the assets to be sold as an entirety, including the rights of the creditors growing out of a seemingly fraudulent diversion of the assets of the corporation by those in control to themselves, without investigation by the Court as to the value of the assets so diverted, or without provision for the recovery thereof upon behalf of the creditors and with the result that the purchasers are thus put in a position to give themselves immunity for their seemingly fraudulent and illegal acts in having diverted important assets of the corporation for their own benefit?

(7) Did not the District Court exceed its jurisdiction and power in making the decree, dated September 6, 1932, directing the transfer from the custody of the Court to the new corporation of the corporate assets (the trust fund) ordered to be sold under the final decree of sale, dated May 31, 1932, these petitioners having theretofore taken and perfected their appeal to the Circuit Court of Appeals from such final decree of sale, dated May 31, 1932?

REASONS FOR THE ALLOWANCE OF THE WRIT

(1) The Courts below violated their trust obligations to these petitioners and to the other creditors of the de-

fendant corporation which obligation arose from the sequestration by the Court in its hands of all the corporate assets and the enjoining of the exercise by the petitioners and the other creditors of their legal remedies; the Courts below thus impaired the petitioners' contracts and, in effect, confiscated their vested legal rights; the proceedings below were a clear departure from the accepted and usual course of legal procedure.

(2) The Courts below, in decreeing a sale of the corporate assets as an entirety for the purpose of effectuating the Plan of Reorganization and in approving the plan and effectuating it, violated the fixed principle established by the decisions of the United States Supreme Court in numerous cases including the case of *Louisville Trust Company v. Louisville N.A. & C.R. Co.*, 174 U. S. 674, 43 L. Ed. 1130 (1899) in that the subordinate rights of the stockholders were here secured at the expense of the prior rights of the creditors including these petitioners; and also violated other principles which manifestly should govern in such matters in that the plan was designed to effectuate and did result in the payment in full in cash of some creditors of the same class and of equal rank with the petitioners while allowing to the petitioners only the receipt of certain securities of comparatively small value.

(3) The District Court in directing the delivery of all of the assets of the corporation to the nominee of the Reorganization Committee pending the decision of the appeal from the final decree of sale, which appeal had been previously taken and perfected, acted beyond its jurisdiction and power and in violation of the rule laid down by this Court in the case of *Hovey* v. *McDonald*,

109 U. S. 150, 27 L. Ed. 888 (1883) and since recognized in numerous decisions.

THE IMPORTANCE OF THE QUESTIONS

This Court has recently in its decisions in *Shapiro* v. *Wilgus*, 77 L. Ed. 149 (December, 1932); *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 76 L. Ed. 1136 (1932) and *Harkin* v. *Brundage*, 276 U. S. 36, 72 L. Ed. 457 (1928); issued distinct warnings in respect to the conduct by the Federal courts in proceedings of this nature in which consent sequestration decrees are obtained in Federal equity suits in order to effectuate a reorganization of ordinary industrial corporations and to bring about judicial coercion of creditors who are not willing to accept the wishes of the stockholders or managers of the corporation or other proponents of such plans.

The prevalence of such proceedings and the manner in which they have been conducted by the Federal courts is presently the occasion of much public comment and criticism.

The courts below in this proceeding, as well as other Federal courts in other similar proceedings, have shown a tendency to depart from the accepted and usual course of judicial proceedings in that they have allowed themselves to be employed in proceedings designed to bring about the destruction of legal rights rather than the upholding and enforcement thereof, which is and should be their fundamental purpose.

It is especially important in view of the existing financial condition and the many failures of corporations

of this type that this Court should clearly define the powers and duties of Federal judges in the conducting of proceedings of this nature.

WHEREFORE, it is respectfully submitted that this petition for a *writ of certiorari* to review the decree of the Circuit Court of Appeals of the Third Circuit dated the 24th day of March, 1933 and the decrees of the United States District Court for the Western District of Pennsylvania dated respectively the 31st day of May, 1932 and the 8th day of September, 1932 which were affirmed by the decree of the Circuit Court of Appeals should be granted.

FIRST NATIONAL BANK OF CINCINNATI and
INTERNATIONAL HEATER COMPANY

by

RALPH ROYALL,
JAMES F. HUBBELL,
HORACE F. BAKER,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

Neither the opinion of the Circuit Court of Appeals of the Third District nor the opinions of Judge Gibson in the District Court are yet reported. The opinions of Judge Gibson are printed at page 416 and page 691 of the record. Printed copies of the opinion of the Circuit Court of Appeals are filed herewith.

JURISDICTION

The jurisdiction to issue the writ is found in Section 240a of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sect. 1, 43 Stat. 938; Sect. 347a of Title 28, U. S. C.

STATEMENT OF FACTS

The statement set out in the foregoing petition is here adopted but may be supplemented by the following matter.

Since the District Court and the Circuit Court both put great stress upon the fact that the Reorganization Committee was seeking to save the business and that about 95% of the debenture holders had deposited their debentures with the Committee and thus assented to the plan, it becomes material to state how this large representation was brought about.

When publicly owned securities in a corporation such as this are defaulted, the individual security holder has

little choice of action. A reorganization plan proposed by the management and sponsored by the banking house of issue is adhered to generally as a matter of pure inertia. The plan is accepted by the rank and file for the simple reason that they have no other practical recourse or remedy.

In the instant case it is true that the debenture holders were given an opportunity to rally in protection of their interests under the standard of an opposition Protective Committee, but as soon as this movement gained strength the proponents of the plan were able to arrest it by inducing the "Protective Committee" to abandon their opposition, and thus the last practical opportunity for the ordinary debenture holders to make any choice was removed. The Reorganization Committee whose expenses, as above stated, were underwritten by the corporation, agreed to pay the opposition "Protective Committee" $35,000 for services etc. in return for the "Protective Committee" turning over to it nearly $1,000,000 of debentures which had been deposited with the so-called "Protective Committee" and abandoning their opposition. (R., p. 759) Lip service was paid to the request of the "Protective Committee" that changes in the plan be made, but these changes were immaterial and without substance. (R., pp. 537-40, 568-74).

Nor should the judgment of the sponsors of such a plan of reorganization be regarded as conclusive under the circumstances. This is so for the reason that they are prejudiced. The plan of reorganization here was sponsored by those who sponsored the merger,—that is to say, the officers of the corporation and Bankers Trust Company, which acted as the banking house of issue of

the $12,000,000 of debentures. Human nature being what it is, their reluctance to admit error in having brought about this ill-conceived merger would induce them to sponsor this ill-conceived reorganization, even if that were not the best thing to be done in the real interests of the creditors. The management is further prejudiced because while the business goes on they will continue to enjoy their salaries.

The conviction of these petitioners, First National Bank of Cincinnati, and International Heater Company, is that the fact of huge deficits for the whole history of the corporation, even including the excellent industrial years of 1928 and 1929, establishes that the merger was ill-conceived and that, by the same token, the reorganization is ill-conceived and against the interests of the creditors. This is the only conclusion consistent with the facts.

In the broad aspect of the matter, one of the fundamental errors arises from the gratuitous assumption by the Courts below that it is a constructive and a beneficial thing for the corporation to be reorganized. We do not believe Courts should proceed upon such gratuitous assumptions. Where, as here, the business of an ordinary industrial corporation is a demonstrated failure, plans for reorganization are not constructive or of a beneficial nature for the creditors or in a broader economic sense. We submit it is better that, when such a business is a demonstrated failure, as much as possible of the creditors' money should be gotten out. We submit further that any other course violates the creditors' fundamental legal right.

We believe that this fundamental error of the Courts below in this case is evidenced in other frequent instances and that Federal Equity Courts are too prone to assume in almost every sort of situation that a reorganization plan for a failed industrial corporation is a constructive and a beneficial thing. We also believe that there is a clear tendency in the lower Federal Courts to permit themselves to be used as a means of coercion in proceedings brought for the purpose of effectuating such plans and that this is clearly against all proper conceptions of the usual and accepted course and purpose of judicial proceedings.

The opinions of both the Courts below show clearly that these Courts were laboring under a further fundamental error in that they determined the matter as though it were the trial of issues in an ordinary law suit between these petitioners on the one side and the complainants, the corporation and the Bankers Trust Company, as Trustee, on the other. The Courts below put much reliance upon the fact that the Reorganization Committee offered themselves as witnesses to give their opinion as to the appropriate upset price at which they should be permitted to buy the property, and that, as these petitioners did not offer witnesses to testify otherwise, the matter must be disposed of as though an issue were presented for adjudication upon uncontroverted testimony. **This means that these two creditors, who are beneficiaries of the trust fund and who were beseeching the Court to perform its trust duty to them and to the other creditors, must, at their own expense, call experts to come forward with appraisals of elab-**

orate plants and plant equipment located in nine different states, as well as experts with opinions upon the value of other property. The expense of such an undertaking might well exceed the face value of the claims of either one of these objecting creditors, even though their claims are of comparatively large amounts. No holder of relatively few debentures could afford to undertake the burden and expense of thus protecting the trust fund in the interest of all the other debenture holders. In any case, it is not their duty but the duty of the Court, the judicial trustee.

Furthermore, it was here manifest that, in view of the nature and amount of the assets constituting it, as to which the evidence was undisputed, the trust fund could have been made to yield by ordinary and careful methods of liquidation an amount largely in excess of the $2,500,000 upset price fixed by the Court. The prejudiced testimony of those seeking to acquire the trust property for a small price did not overcome these undisputed figures.

The fund is in the hands of the Court for administration as a trust. As above stated, the decree indicates that the Court has in mind the use of the fund to the extent of perhaps as much as $300,000 for administration allowances. The decree shows that the Court has in contemplation the making of these allowances to the Reorganization Committee, the Receivers, and the Bankers Trust Company, as Trustee, and their respective counsel (R., p. 456, 457),—all of whom were seeking, not to defend the trust, but to defeat it by having the Court turn over the assets to their nominee at as low a price

as they could induce the Court to fix. The Courts have proceeded thus far in the case upon the basis that several hundred thousands of dollars of the fund may be made available for allowances, etc., for those who stand in the position of seeking to defeat the trust and the rights of the trust beneficiaries, while any of the trust beneficiaries who seek from the Court a true administration of the trust fund are told that, if the fund is to be protected, this must be done at their individual expense.

SPECIFICATION OF ERRORS

I. The Courts below erred in not carrying out under the Court's supervision a liquidation by separate sales properly designed to bring about the best yield from all the various far flung properties, reserving in the Court's hands the cash and Liberty Bonds and receivables and other virtually liquid assets; and in granting in lieu thereof the desire of a group of the creditors and stockholders that the property be turned over to them as an entirety, without taking such steps and making such investigations as would show beyond peradventure that in so doing the Court did not in effect violate its trust duties or the rights of any of the creditor beneficiaries.

2. The Courts below erred in approving the plan in that it failed to give full recognition to the rights of creditors while reserving in the stockholders an interest in the assets of the corporation; and in that the plan provided for discrimination between general creditors of the same class by paying some of them in full in cash

while only providing for others securities in the new corporation of comparatively little value.

3. The District Court erred in parting with the trust fund and directing the delivery of it to the new corporation, there to be consumed and wasted, after the appeal from the final decree of sale had been perfected, as the Court then had become powerless further to act in the premises.

ARGUMENT

I

As said by this Court in *Hollins* v. *Brierfield Coal & Iron Company,* 150 U. S. 371, 37 L. Ed. 1113 (1893) at page 383, in speaking of corporate assets sequestered in the hands of Receivers in a Federal equity suit of this nature,

> "It is * * * a trust in the administration of the assets after possession by a court of equity * * *."

The proposition would seem axiomatic. **It manifestly follows that the Court, having sequestered in its hands the assets of the corporation for the purpose of administering them as a trust for the benefit of creditors, is under a clear duty to do just that thing.**

Even though the Court might, as here, with propriety proceed to a final decree of sale of such assets as an entirety without prior notice to the creditors of the application for the making of such decree, which is doubtful, it would follow all the more that in so doing

the Court should be most mindful of its trust duties to each and every creditor beneficiary and see to it that such steps were taken as should satisfy a court beyond peradventure that in so doing it was not in practical effect violating the rights of any creditor beneficiary. This, the Court below clearly failed to do.

It is not sufficient to justify the course adopted for the Court to say, as the opinions of the District Court and the Circuit Court of Appeals seem to hold, that it was done at the behest of 95% of the creditors. This is not a corporate election. It is the judicial administration of a trust. A majority of the beneficiaries of a trust may not induce a breach of trust.

II

The plan clearly violates the "fixed principle" long ago set down by this Court and adhered to as controlling in such matters and for that reason the Courts below erred in approving the plan and decreeing a sale for the purpose of effectuating it. As said by this Court in *Louisville Trust Company* v. *Louisville N. A. & C. R. Co.*, 174 U. S. 674, 43 L. Ed. 1130 (1899), at page 684:

> "Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

This Court said in the case of *Northern Pacific R. R. Co.* v. *Boyd*, 228 U. S. 482, 57 L. Ed. 931 (1912) at page 504:

> "They (the stockholders) were in the position of insolvent debtors who could not reserve an interest as against creditors."

And, again, this Court in the case of *Kansas City Term. R. R. Co.* v. *Central Union Trust Company,* 271 U. S. 445, 70 L. Ed. 1028 (1926), referring to these earlier decisions, said at page 454 that this doctrine is "the fixed principle * * * and to it there should be rigid adherence".

The plan also violated the basic rights of creditors in that it discriminated between them by providing for the payment of some general creditors in full in cash while relegating other general creditors including these petitioners to the mere right to receive a diminished amount of securities of the new corporation. The attempt below to defend this arrangement as coming within the six months' rule was clearly baseless, as this rule has application only to public utility corporations and is not applicable in any sense to mere industrial corporations.

Spencer v. *Taylor Creek Ditch Co.,* 194 Fed. 635, (C. C. A. 9th 1912).

III

The authorities clearly hold that after the taking and perfecting of an appeal from the decree of a District Court, that Court is powerless to proceed further pending the appeal.

Midland Terminal Ry. Co. v. *Warinner,* 294 Fed. 185, C. C. A., Eighth Cir. (1923);
Hovey v. *McDonald,* 109 U. S. 150, 27 L. Ed. 888 (1883);

Newton v. *Consolidated Gas Co.*, 258 U. S. 165, 66 L. Ed. 538 (1921);
Merrimack River Sav. Bank v. *Clay Centre*, 219 U. S. 527, 55 L. Ed. 320 (1910).

Notwithstanding the fact that the appeal had been perfected from the final decree of sale, dated May 31, 1932, the District Court persisted, over the protest of these petitioners, in making a further decree, dated September 6, 1932, directing the delivery of the deeds to the new corporation as a nominee of the Reorganization Committee, thus permitting the trust fund to pass out of the hands of the Court and to become consumed or wasted by the new corporation. As a result of the autocratic proceedings of the District Court terminating in the final act above referred to, a position has been created which the Circuit Court of Appeals seems to have regarded as a *fait accompli* and which seems to have affected their conclusion to affirm the decrees appealed from.

CONCLUSION

It is submitted that, for the reasons above stated, a definition by this Court of the powers and duties of Federal Courts of Equity in such proceedings is most important. This proceeding has resulted in the impairment of these petitioners' contracts and in a virtual confiscation of their vested legal rights. The steps taken by the District Court in arriving at the decrees appealed from were a clear departure from the accepted and usual course of judicial procedure. The authoritative settlement by this Court of these questions at this time is

urgent in view of the prevalence of proceedings of this nature in the Federal Equity Courts.

Respectfully submitted,

RALPH ROYALL,
JAMES F. HUBBELL,
HORACE F. BAKER,
Of Counsel.

FILE COPY

OCT 19 1933

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

BRIEF FOR PETITIONER FIRST NATIONAL BANK OF CINCINNATI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, *Petitioners,* vs. RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.	No. 62
FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, *Petitioners,* vs. RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.	No. 63

BRIEF FOR PETITIONER FIRST NATIONAL BANK OF CINCINNATI

This case comes before the Court on a writ of *certiorari* to the Circuit of Appeals for the Third Circuit, issued May 29, 1933 (77 L. Ed. 1013).

The decrees below are the decree of the United States Circuit Court of Appeals for the Third Circuit, filed on the 24th day of March, 1933, which affirmed the final decree of sale filed in the United States District Court for the Western District of Pennsylvania on the 31st day of May, 1932, and the decree confirming the sale and approving the plan of reorganization filed therein on the 8th day of September, 1932, in the equity suit

brought in that court entitled *"Rudolph B. Flershem, et al. as the Reorganization Committee,* etc., complainants, against *National Radiator Corporation,* defendant."

Separate petitioners, Artz and Ramsey, (No. 64) did not become intervening parties. They appeared by independent counsel upon the return of the published notice of the application to confirm the sale and approve the plan which ripened into the supplemental decree, dated the 8th day of September, 1932, and attacked the jurisdiction of the Court. A separate suit, through the same counsel as in No. 64, entitled *"Clapier against Flershem, et al."* (No. 65) which was brought as an attack upon the jurisdiction of the District Court also resulted in a separate appeal to the Circuit Court of Appeals. All of these separate appeals were placed on the calendar together by the Clerk of the Circuit Court of Appeals. They were all separately argued at the same time and all disposed of in the one opinion of the Circuit Court of Appeals. Separate petitions for writs of certiorari were made and granted in Nos. 64 and 65 (77 L. Ed. 1013). We understand from the Clerk of this Court that Nos. 64 and 65 are to come on for argument at the same time as the case in which we appear.

Opinions Below

The opinion of the District Court filed upon making the decree of sale is printed at pages 280-3 of the Record. The opinion of the District Court filed upon making the decree confirming the sale is printed at page 463 of the Record. Neither of these opinions is published. The opinion of the Circuit Court of Appeals is printed at pages 534-44 of the Record, and is reported in 64 Fed. (2d) page 847.

Jurisdiction

The jurisdiction arises from the granting of the writ of certiorari herein pursuant to Section 240a of the Judicial Code as Amended by the Act of February 13, 1925.

Concise Statement

This is a suit brought by the Reorganization Committee as complainants in the United States District Court for the Western District of Pennsylvania for the purpose of effectuating a plan of reorganization of National Radiator Corporation (the defendant). The suit resulted in the making of a perfunctory judicial sale in a manner studiously designed to effectuate a transfer of all of the assets of the corporation to the nominee of the Reorganization Committee for the sum of $2,500,000, although in 1927 the same interests as those sponsoring the reorganization represented the corporate assets as having a value of approximately $25,000,000. This representation was made in connection with the sale at that time of $12,000,000, of debentures* (R. 274).

This petitioner First National Bank of Cincinnati is the owner of $68,000 in face amount of such debentures which were acquired by it at the time of their issue at the issue price of $1,000 a debenture (R. 95, 273).

The petitioner International Heater Company is the owner of $60,000 of corporate notes issued to it by the corporation on account of payment of the purchase price for its interest in property acquired from it by the corporation in 1928. That petitioner is submitting a separate brief.

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*Through the operation of the Sinking Fund or by corporate acquisitions the debentures outstanding had been reduced to $10,716,000 at the time of the receivership (R. 36).

The debentures were unsecured. All the creditors were unsecured general creditors.

The suit had its genesis at a directors' meeting of National Radiator Corporation held on the 31st day of January, 1931, at which it was resolved to default upon the debenture interest due February 1, 1931 and to ask the complainants, who include the two ranking officers of the corporation, to act as a Reorganization Committee. It was also resolved that the corporation should undertake to pay the expenses of the Reorganization Committee (R. 499-502). A plan of Reorganization dated February 11, 1931 for the benefit of debenture holders and preferred and common stockholders was immediately promulgated (R. 32).

After obtaining the deposit of $8,736,000 in principal amount of the debentures (R. 9) and a majority of the preferred and common stocks, the Committee filed this suit as complainants on October 5th, 1931 (R. 6). The answer of the complainants to the intervening petition of First National Bank of Cincinnati admits "that they filed the bill of complaint in this cause as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931" (R. 99). The bill of complaint prayed "that the properties and assets and business of the defendant may be ordered to be sold as an entirety" (R. 13). The answer of defendant National Radiator Corporation to the bill of complaint "admits the truth of the allegations therein contained, joins in the prayers thereof, and consents to the appointment of a receiver or receivers as therein prayed for" (R. 64). Upon the filing of this bill of complaint and this answer the Court, without legal notice to anyone, on the 9th day of October, 1931, made a decree completely sequestering the assets of the corporation in the Court's hands and appointing Robert S. Waters, the Vice President

and General Manager of the corporation, and William G. Heiner as Receivers and enjoining suits (R. 64-8).

The National Radiator Corporation was organized in August, 1927 to effectuate a merger of six corporations with far-flung plants located in nine states engaged in the business of manufacturing boilers, radiators and similar articles. A public issue of $12,000,000 of unsecured debentures was made in August, 1927 by the respondent Bankers Trust Company as the banking house of issue for the purpose of effectuating this merger. The Bankers Trust Company is also the trustee under the indenture relating to the debentures and also served in the capacity of depositary under the Plan of Reorganization dated February 11, 1931 (Banker's Circular R. 269-80).

The banker's circular in which the corporation joined and upon which the debentures were sold in 1927, showed assets of $26,192,261.72 and liabilities of $1,478,061.72, other than the liability upon the $12,000,000 of debentures and upon shares of preferred and common stock which had a stated liability of $11,500,000 (R. 273-4).

The operations of the corporation for the full years of its operation after the merger became effective and until the receivership, that is to say, the years 1928, 1929 and 1930, showed losses as follows (R. 33):

1928	$1,343,491
1929	1,234,329
1930	1,453,870
	$4,031,690

The business as an entirety was a demonstrated failure.

In February, 1931 at the time the corporation defaulted on the semi-annual interest payment of about $300,000 then due upon the debentures and at which time the Reorganization Committee was organized and the Plan of Reorganization, dated February 11, 1931, was

promulgated, the corporation had current assets of $5,054,007.30 of which $1,701,899.94 was cash. There were then other assets sufficient to bring the total up to $19,434,548.08. The only presently payable liabilities, other than the semi-annual debenture interest then falling due, were $46,787.60 of accounts payable (R. 34-5).

In the spring of 1932 the respondents, without notice to the creditors, submitted to the District Court the final decree of sale which was signed and filed in that Court on May 31, 1932 (R. 283). The three ranking officers of the corporation, Mr. John H. Waters, President (and chief stockholder), Mr. Rudolph B. Flershem, Chairman of the Board, and Mr. Robert S. Waters, Vice President and General Manager (and the President's son), the first two of whom are also members of the Reorganization Committee, were placed upon the stand by the complainants below to testify as to upset price. They wanted to buy the property as cheaply as they could. They testified that about $2,300,000 was an appropriate price (R. 153, 231). The receiver Heiner, who may be said to have been the Court's receiver, was also called by counsel for the Reorganization Committee to testify to the same effect (R. 257). **Both of the receivers as well as the Reorganization Committee, were represented throughout the proceedings by the same counsel** (R. 80).

The decree submitted and signed provided for the sale at New Castle, Pennsylvania, of the property as an entirety, including cash, Liberty bonds, accounts receivable, receivers' inventory, plants and machinery, numerous warehouses, numerous dwellings and an office building and an apartment house. This real estate was situated in nine different states. The decree was studiously designed to effectuate a perfunctory judicial sale for the purpose of accomplishing the Plan rather than a real

liquidation for the purpose of bringing about the best possible yield to the trust in the Court's hands (R. 301, 318-319, 321). These provisions are briefly analyzed at pages 25-8, *infra*.

The Court fixed $2,500,000 as the upset price for such sale (R. 326).

At the time of this hearing the current assets to be the subject of this sale consisted of the following (R. 257-8):

Cash	$ 852,096.29
United States Certificates of Indebtedness	980,000.00
Accrued interest thereon	6,124.97
Bank Certificates of Deposit	50,000.00
Cash surrender of Life Insurance	22,900.00
New York State Bonds	18,686.33
Accounts Receivable	858,992.41
Inventory (merchandise)	1,634,905.25
Total	$4,423,705.25

In addition to this, there were plants and machinery carried in the receivers' inventory after full depreciation at $6,743,419.15 (R. 260). In addition thereto, there were the rights as creditor, majority stockholder and equitable owner of the rest of the stock of the Steel Boiler Company, which we will discuss below. In addition there were the patents; trade-marks and trade-names which with good-will were carried by the corporation at $6,634,501.90 (R. 34) as well as other valuable items.

The Court failed to take suitable measures to assure itself that the sale conducted under such decree and at such an upset price would yield as much as would the holding in the hands of the receivers of the cash, Liberty bonds and receivables and the careful and businesslike sale of the inventory and machinery, plant, equipment and of the very numerous pieces of real estate in separate

lots and the taking of appropriate steps to effectuate a recovery and liquidation of other assets hereafter mentioned. The Court did not secure an appraisal and acted only upon the socalled opinion of the purchasers who wanted to buy the property as cheaply as they could. The proceedings before the District Court relating to this are briefly analyzed at pages 28-39, *infra.*

The petitioner First National Bank of Cincinnati, which at the time of the hearing was making an application to intervene (R. 2), became apprised of the application for the final decree of sale and was permitted to cross examine the above mentioned witnesses. This party besought the Court to take suitable measures in order to investigate the value of the properties and the best method of realizing upon the fund for the protection of this intervenor and of each and every other creditor of the trust fund in the hands of the Court, but this the Court refused to do.

The petitioner International Heater Company was not heard at all upon the application for the decree of sale and learned of the hearing only by chance after it was all over. It thereafter intervened (R. 133) and, together with the petitioner First National Bank of Cincinnati appealed to the Circuit Court of Appeals from the final decree of sale dated May 31, 1932 (R. 332-3). These petitioners also joined in contesting the propriety of making the further order dated the 8th day of September, 1932, approving the Plan and directing the transfer of the assets (the trust fund) from the custody of the Court to the new corporation, and joined in appealing from that decree (R. 477). The latter decree was made after the appeal from the former decree had been perfected.

These petitioners also joined, pending the decision of the appeal from the final decree of sale, in applying

to the Circuit Court of Appeals for a postponement of the transfer by the Receivers of the assets to the new corporation and the approval of the Plan (Supp. R. 552-7). But the presiding Judge of the Circuit Court of Appeals permitted the lower Court to order the transfer of the assets notwithstanding the fact that an appeal from the final decree of sale had been taken and perfected (Supp. R. 564).

The Reorganization Committee (complainants) acted on behalf of debenture holders, preferred stockholders and common stockholders. The Plan provided that the rights of the debenture holders as creditors should as such be cut in half and that their right to receive interest should depend upon earnings. At the same time, the Plan preserved in the preferred stockholders a substantial share in the assets of the corporation in the form of junior securities but without imposing any condition by way of contribution of new capital, or otherwise; in other words, gave them a "free ride." The Plan also provided that the common stockholders, upon the payment of the nominal sum of One dollar in respect to each three shares of old common stock, might acquire a warrant evidencing their right to buy stock of the new corporation at a fixed price at any time within the next ensuing twenty years (R. 40-1). The Plan also provided that the Committee should have the discretion to pay certain ordinary creditors in full in cash (R. 44); and, in carrying out the Plan, all the miscellaneous general creditors (but not including these petitioners or other dissenting debenture holders) were paid in full in cash (R. 434).

As to these petitioners, however, they were permitted to receive only the securities of the new corporation as arranged by the Committee or be relegated to the receipt of such dividend as would follow from this grossly inade-

quate upset price after the deduction therefrom of the amount of such allowances to the complainants and the receivers and the Trustee and their respective counsel as the Court might be induced to grant (R. 309-10). The decree contains a provision reserving out of the cash included in the sale the sum of $300,000 to be used for that and similar purposes (R. 307).

In 1927 the respondents represented the assets to be worth $25,000,000. In 1931 they carried them at $20,000,000. In 1932 they passed them through the Court to their new corporation with a capital structure of $16,000,000 (R. 37, 39-40). But while the assets constituted a trust in the Court's hands, they said they were worth but $2,500,000. The Courts below adopted their views. What is there in the judicial touch which renders assets comparatively valueless when constituting a trust in the Court's hands although of great value at every other moment?

This petitioner brought out upon the cross examination of respondents' witnesses that there had recently been developed in laboratories of the corporation, by officers and employees of the corporation, and at the expense of the corporation, a new type of steel boiler, and that the capital for financing the manufacture and sale of these special boilers was also furnished by the corporation; also, that these patents and devices were put into another corporation called the "National Steel Boiler Company," but that only a bare majority of this stock was issued to defendant corporation, and that the rest of it was issued to some of its officers and employees who claim to own it in their individual rights (R. 200-3). As to this new invention, it was stated in a printed circular addressed by the Reorganization Committee to the debenture holders to induce the deposit of debentures that the corporation "has developed new and improved products of

great promise including, among others, steel boilers" (R. 358-9). This petitioner besought the Court to take appropriate action to have this transaction, which on its face seemed fraudulent, undone, in order that this apparently valuable asset might be recovered for the benefit of the creditors. The Court below, as well as the Circuit Court of Appeals, completely ignored this request and decreed a sale of all the assets as an entirety to the nominee of the Reorganization Committee with the result that the old interests have acquired the rights of the corporation and have thus been put in a position to give themselves immunity for their seemingly fraudulent acts in this important transaction.

The further result of the decrees is to continue the business in the hands of the same management under whose charge it was a demonstrated failure.

In the opinions handed down by the District Court and in the opinion also handed down by the Circuit Court of Appeals, both Courts refrained from discussing the main point urged before each of such Courts by this petitioner, that, the Court having sequestered the whole of the debtor's property for the protection of creditors and enjoined suit, the fund constituted a trust in the hands of the Court, and that each and every creditor had a fundamental right to the due administration by the Court of such trust in such manner as to provide the greatest possible payment to each of the creditors.

Both of the Courts below stressed the fact of the size of the majority of debenture holders represented by the Committee and that testimony had been offered by the Committee which the petitioner did not call witnesses to controvert. Both of these Courts treated the matter as though it were a normal adversary proceeding.

The District Court found that the proceedings were not collusive (R. 281); and the opinion of the Circuit

Court of Appeals approved this finding (R. 537). This petitioner did not claim below and does not claim here that consent sequestration decrees of this nature may not be made or that the existence of collusion is necessarily fatal. But it was perfectly manifest, from its inception and throughout, that the suit was collusively brought and maintained for the mere purpose of effectuating the reorganization plan. As said by the late Judge Mayer, who had perhaps as large an experience as any Judge in the conduct of reorganization receiverships, that, when such proceedings are in fact collusive, it is "much better to be perfectly frank about it." (Lectures on Legal Topics, Vol. 6 (MacMillan Co. 1929), p. 166.)

We believe that we may say with all due respect that the opinions in both the Courts below are not entirely judicial. One of the vices and dangers of the autocratic steps often taken by Courts in the exercise of this rather anomalous jurisdiction is that they are, in rendering their decisions, apt to find themselves in a position of defending their own conduct rather than making the purely judicial determinations which Courts are called upon to render in normal adversary law suits.

Specification of Errors—Summary of Argument

1. The Courts below erred in not carrying out under the Court's supervision a liquidation by separate sales properly designed to bring about the best yield from all the various far flung properties, reserving in the Court's hands the cash and Liberty Bonds and receivables and other virtually liquid assets; and in granting in lieu thereof the desire of a group of the creditors and stockholders that the property be turned over to them as an entirety, without taking such steps and making such investigations as would show beyond peradventure that

in so doing the Court did not in effect violate its trust duties or the rights of any of the creditor beneficiaries.

2. The Courts below erred in approving the plan in that the plan failed to give full recognition to the rights of creditors while reserving in the stockholders unconditionally an interest in the assets of the corporation; and in that the plan discriminated between general creditors of the same class by providing for the payment of some of them in full in cash while only providing for othe s securities in the new corporation of comparatively little value.

3. The District Court erred in parting with the trust fund and directing the delivery of it to the new corporation, there to be consumed and wasted, after the appeal from the final decree of sale had been perfected, as the Court then had become powerless further to act in the premises.

POINT I

The courts below erred in not carrying out under the Court's supervision a liquidation by separate sales properly designed to bring about the best yield from all the various far-flung properties, reserving in the Court's hands the cash and Liberty Bonds and receivables and other virtually liquid assets; and in granting in lieu thereof the desire of a group of the creditors and stockholders that the property be turned over to them as an entirety, without taking such steps and making such investigations as would show beyond peradventure that in so doing the Court did not in effect violate its trust duties or the rights of any of the creditor beneficiaries.

A. Creditors have the fundamental right to the liquidation of the assets of their debtor so as to provide the greatest possible payment to the creditors. This proposition is basic and self-evident, but this right was completely violated by the decrees below.

A bare majority of creditors, or ninety-nine per cent. of the creditors of a mere industrial corporation, have no right to compel a reorganization of the debtor corporation as an entirety by means of an equity receivership unless the dissenting creditors receive substantially what would have been received upon a normal fair liquidation or its equivalent.

The answer of the complainants and defendant to the intervening petition of the appellant herein, states: "The complainants admit that they filed the bill of complaint in this case as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931".

(R. 99). There is no such function of a federal equity suit in the event of insolvency, legal or equitable, of a private corporation.

The judicial power of the Federal District Court to sequester the property of the corporation rested upon the facts that the corporation was so embarrassed as not to be able to pay its debts (here rather thinly established and only by the complainants' allegations and the defendant's answer); that the corporate property is a fund for the benefit of all the creditors, and that it was essential to avoid judgments and attachments by various creditors and a waste of the fund in which they are interested. Since the Court has power to take these assets into its hands only as a fund for creditors, it must be so treated. Any other view would be intolerable.

In *Hollins* v. *Brierfield Coal & Iron Company,* 150 U. S. 371, 14 Sup. Ct. 127 (1893), a receivership case, the Court said at page 383:

> "It is * * * a trust in the administration of the assets after possession by a court of equity * * *."

This Court writing by Chief Justice Taft has taken occasion to sound a clear note of warning in *Harkin* v. *Brundage,* 276 U. S. 36, 48 Sup. Ct. 268, 72 L. Ed. 457 (1927). The Chief Justice said at page 55:

> "The desire of those who represent an embarrassed corporation to seek a refuge from active and urgent creditors under the protecting arm of an officer of the court, leads to strenuous efforts to frame a case which may under equity practice justify a receiver. More than this, circumstances which should have no influence lead the parties in interest to prefer one court to another in the selection of the person to be appointed as receiver, with the hope on behalf of those in charge of the embarrassed corporation that the appointment may

> fall to one whose conduct will be in sympathy with, rather than antagonistic to, the previous management of the corporation, in the hands of which the embarrassment has arisen. As the court of appeals says there should be no 'friendly' receiverships, because the receiver is an officer of the court and should be as free from 'friendliness' to a party as should the court itself."

In *Michigan* v. *Michigan Trust Company,* 286 U. S. 334, 52 Sup. Ct. 512, 76 L. Ed. 1137 (1932), this Court took the occasion to renew this warning. The Court said:

> "This court has had occasion to point out the abuses that can arise from friendly receiverships forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay. *Harkin* v. *Brundage,* 276 U. S. 36, 52, 54, 72 L. ed. 457, 464, 465, 48 S. Ct. 268; *cf. Kingsport Press* v. *Brief English Systems* (C. C. A. 2d) 54 F. (2d) 497, 499, 500. Receiverships for conservation have at times a legitimate function, but they are to be watched with jealous eyes lest their function be perverted."

In *Shapiro* v. *Wilgus,* 287 U. S. 348, 53 Sup. Ct. 142, 77 L. Ed. 149 (1932), the Court said:

> "Ordinarily a creditor who seeks the appointment of receivers must reduce his claim to judgment and exhaust his remedy at law. * * * the rule in the Federal courts remains what it has always been. *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 497; *Scott* v. *Nealy,* 140 U. S. 106; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 379; *Matthews* v. *Rodgers,* 284 U. S. 521, 529. True indeed it is that receivers have at times been appointed even by Federal courts at the suit of simple contract creditors if the defendant was

willing to waive the irregularity and to consent to the decree. This is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good. *Re Metropolitan Railway Receivership,* 208 U. S. 109, 111. It has been done at times, though the public good was not involved, where legitimate private interests might otherwise have suffered harm. *United States* v. *Butterworth Co.,* 269 U. S. 504, 513; *Kingsport Press* v. *Brief English Systems,* 54 F. (2d) 500; *Harkin* v. *Brundage, supra,* p. 52. *We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, 345; *Harkin* v. *Brundage, supra. Never is such a remedy available when it is a mere weapon of coercion,* * * * " (Italics ours.)

In *National Surety Co., et al.* v. *Valeria E. Coriell, et al.,* 77 L. Ed. 865 (1933), this Court said at page 869, *et seq.:*

" * * * we are of opinion that the decree approving the plan should have been reversed in its entirety because the procedure pursued by the District Court was improper.

First. The non-assenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based on adequate data. The District Court had before it, in support of the plan, only informal, inadequate and conflicting *ex parte* assertions unsupported by testimony. * * * There was no valuation of the assets by a disinterested appraiser; * * * The failure to require relevant data before deciding whether the plan should be approved was not cured by the declaration of the Circuit Court of Appeals that the dissenting creditors were en-

titled to an aliquot share of what, a year later, it might be estimated the property would have brought at a public sale, and authorizing them to recover that amount, if assets available to satisfy their claims were then available.

Second. Every important determination by the court in receivership proceedings calls for an informed, independent judgment. In the case at bar special reasons existed why the court should have secured adequate, trustworthy information. The proceding was not an adversary one; and jurisdiction rested wholly upon the consent of the defendant corporation."

In *Kingsport Press, Inc.* v. *Brief English Systems, Inc.*, 54 Fed. (2d) 497 (C. C. A. 2d 1932) (*certiorari* denied), the Court said at page 501:

"It is vital that such a receivership as this should have the most careful and constant supervision. It should not be the means to continuing an enterprise that does not show evident signs of working out for the benefit of the creditors. Their rights should be preserved at all hazards, and corporate assets applicable to their claims must not be kept at risk in the hope of benefiting stockholders who are in an entirely subordinate position. * * * *The statement of the Supreme Court in Harkin* v. *Brundage, supra, to the effect that receivers should not ordinarily be appointed at the suit of a simple contract creditor should warn any judge, who has found it necessary to appoint a receiver because of special circumstances, to see that the business is liquidated as economically and speedily as possible, unless its continuance is demonstrably beneficial to the corporate creditors."* (Italics ours.)

The complainants, the corporation, the Trustee under the Indenture, the receivers, their counsel and the Courts

below, relied upon the typical railway foreclosure suits such as *Guaranty Trust Company of New York* v. *Chicago, Milwaukee & St. Paul Railway Co.* 15 Fed. (2d) 434 (N. D. Ill., 1926), *Phipps* v. *Chicago, R. I. & P. Ry. Co.*, 284 Fed. 945, 949, (C. C. A. 8th 1922) and *Palmer* v. *Bankers Trust Company*, 12 Fed. (2d) 747 (C. C. A. 8th 1926).

These railway foreclosure suits present situations, both from the legal and the practical point of view, totally unlike the situation presented by the instant case. In the railway foreclosure cases the mortgagee is legally entitled to a decree of foreclosure. The receivers are appointed pursuant to a right of receivership stipulated in the mortgage, and are primarily receivers under the mortgage and for the benefit of the mortgagee. The mortgagee is entitled to buy it in and thus foreclose all other interests.

Furthermore,—and this is very important,—the subject matter is a railway, a public utility, with huge and far-flung properties, all of which broadly speaking are essential to its continued existence and operation. The property is affected by a public interest and the operation of it or of any essential part of it could not be discontinued without consent of public authorities, which consent could not be obtained. Such railway properties are valued at many millions often several hundred millions, and the mortgages under foreclosure are of comparatively huge amounts. In the nature of things such property can only be sold as an entirety, and there is not the least possibility of an outside bidder for it as an entirety. There is but one possible solution, and that is for the property to go to the mortgagee. As the property must thus be taken over in the interests of the mortgagee and its operation continued, a reorganized corporation must be set up for such purposes and new securities

issued to the holders of the bonds under the mortgage. How this corporation can best be set up for the benefit of the bondholders is the real question to be dealt with. A wholly disinterested trustee under the mortgage, and a committee having no interests other than the protection of the bondholders, often do and should represent the bondholders in such a situation. The parties also often take steps designed to give some recognition to the equities of the unsecured creditors. Such plans some times also make provision for the protection of other junior interests, such as preferred and common stockholders, on terms deemed suitable, such as the right to subscribe to stock of the reorganized corporation. But these supplemental measures are in the nature of a concession from the bondholders. In the course of such proceedings it has become a practice for the proposed plan of reorganization to be submitted to the Court, and for the Court to give judicial countenance to the arrangements, although in a sense this is rather an extrajudicial function.

In such cases the Courts have discussed the questions of the right of intervention by bondholders, upset price, the sale of the property as an entirety, etc. Judge Wilkerson in the *Chicago, Milwaukee & St. Paul* case has perhaps gone farther than any other of the judges of this country in giving the aid of the Courts to the accomplishment of a reorganization plan.

We submit that the instant case and the railway foreclosure cases are as far apart as the two poles. Here we have a mere industrial corporation with nothing but general creditors. The corporation is wholly unlike a public utility such as the huge railway companies which are exempt from bankruptcy. The suit, totally unlike a foreclosure suit, is a mere suit by a group of general creditors invoking the power of the Court to sequester

the property of the corporation in order that it may be preserved and liquidated to the best advantage of all the creditors.

In the case of *Ex-parte Manhattan Railway Company*, 61 Fed. 2d 941 (C. C. A. 2d 1932), the Court called attention to the difference between equity receivership proceedings in respect to a public corporation, such as a railway, and in respect to a private industrial corporation, such as National Radiator Corporation. Judge Learned Hand said:

> " * * * if such suits are ever justified, they are justified in the case of a railroad. Bankruptcy not being open, the choice is between this kind of bill, a judgment creditor's bill, either in the District Court or the state court (sec. 70, Gen. Corp'n Laws of N. Y.), or a suit to dissolve the corporation. * * * Dissolution is a heroic remedy for a public corporation. * * * There are no real purchasers for such property as a whole, and it cannot be sold in parcels without destroying it as a public servant. For these reasons interference with the ordinary remedies of creditors is not a grievance, and the only genuine question that can arise is whether the allocation of new interests in the property shall be made in a state or a federal court. * * *"

The opinion below of the Circuit Court of Appeals fails to distinguish between the varying positions of the separate appellants and, speaking of the appellants as a group, falls into error in stating generally that they attacked the jurisdiction of the Court (R. 538).

This petitioner did not question below and does not question here the jurisdiction of the Court,—it is the manner of the exercise of such power which we question. We believe this Court intends to give countenance to the making by the District Courts of general seques-

tration decrees of the assets, even of industrial corporations, upon bills brought by simple contract creditors where the debtor corporation consents, *provided the Court proceeds with a jealous eye to the proper protection of the interests of creditors.* This Court's decisions in *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 43 Sup. Ct. 454, 67 L. Ed. 763, (1923) and in *Shapiro* v. *Wilgus, supra,* which are cited in the opinion of the Circuit Court of Appeals as authorities in support of the Federal Court's jurisdiction, so indicate. The case of *Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.,* 281 Fed. 265 (1922), from the opinion of Judge Learned Hand in which the Circuit Court of Appeals quotes with approval is to similar effect. But as pointed out in the opinion in that case on page 269:

> "Such bills may, of course, be abused by the collusion of the debtor and friendly creditors. They may be abused by the court's refusal to allow a present liquidation, disregarding the creditors' unqualified right to present payment, and preserving the property for the debtor, which is not entitled to more consideration than its creditors collectively think wise to give it. But that has nothing to do with the propriety of the bills as such; they form a necessary and important part of insolvency law, and are of unquestioned validity."

We do not share or urge the extreme views of the United States District Judge in Montana who recently committed for contempt the attorneys who appeared before the Court to submit the usual complaint, answer of the defendant corporation and consent to the sequestration decree. (*May Hosiery Mills* v. *F. W. Grand Stores,* 59 Fed. 2d 218 (1932))

But it is presently a matter of public comment that the Federal Courts have been guilty of abuses in their

method of conducting such proceedings.* Such criticism is not without justification. We submit that the instant case is an example of such abuse.

The Court in cases such as the instant one may be properly characterized,—to coin a phrase,—as "a judicial trustee." It is the plain duty of the Court, having exercised its great judicial power in taking into its hands the properties of this corporation for the purpose of handling it for the protection and benefit of all the creditors, to do just that thing. The receivers as officers of the Court must proceed solely in accordance with that single, plain principle. That this was not done here is self-evident.

B. The decree of sale was erroneously framed to effectuate the plan of reorganization and not to secure a normal liquidation or its equivalent,—the upset price was grossly inadequate.

As pointed out above, ninety odd per cent. of the debenture holders and a majority of the stockholders leagued together under the sponsorship of the management and the Trustee under the Indenture for the purpose of becoming the owners of all the corporate property. Their interest obviously was to buy the property as cheaply as possible. The interest of the other creditors was to have the property sold by normal liquidation or its fair equivalent at the highest possible price. The right to a fair liquidation or its equivalent could not be destroyed by the banding together of a majority of the creditors to secure the property for themselves for the

*Lowenthal (1933), *The Investor Pays* (this is a thorough commentary upon the Chicago, Milwaukee & St. Paul receivership—*Guaranty Trust Co. v. Chicago, Milwaukee & St. Paul Ry. Co., supra* p. 19—with references to the Congressional investigation, records, etc.); Wham, *Consent Receiverships in the Federal Court*, Amer. Bar. Assn. J., Jan. 1933, page 7; Finletter, *Federal Consent Receiverships*, 15 Penn. Bar. Assn. Quarterly, March 1933, page 1; Powers, *Friendly Receiverships in the Federal Courts* (1933) 17 Ill. L. Rev. 542; N. Y. Times, April 10, 1933, page 27; *The Fee Feed-Bag*, American Mercury, June 1932, pp. 140-9.

lowest possible price. *The majority of the beneficiaries of a trust have no power to induce a breach of it for their own benefit.*

The complainants (Reorganization Committee), the management, and the receivers gave opinion testimony before the District Court as to upset price which was inconsistent with the established facts and, indeed, ridiculous. The Trustee under the Indenture acquiesced. Current assets alone were approximately $4,500,000. In addition to this, there were the plants, warehouses, dwellings, office building, machinery, patents, trademarks, trade-names and all other assets carried at about three times the amount of the current assets. For all of these assets the complainants and the trustee sought an upset price of about $2,300,000, and the District Court virtually acquiesced by fixing an upset price of $2,500,000.

If the concern were as worthless as the Court found it to be, the proceedings should have been dismissed so that the matter could be taken to the bankruptcy side of the Court where liquidation is the watchword. (*Municipal Financial Corporation* v. *Bankus Corporation,* 45 Fed. 2nd 902 (1930).)

In addition to fixing such an upset price, the District Court decreed that all of the assets and properties of the corporation should be sold at public auction *at Newcastle, Pennsylvania,* for $2,500,000. It need hardly be pointed out that the sale of parcels of real estate located in Chicago, Illinois, Richmond, Virginia or Framingham, Massachusetts, for example, should not be conducted at the County Court House in Newcastle, Pennsylvania. Furthermore this was in violation of Section 847, Title 28 of the Judicial Code.

If the Court contemplated taking the measures best designed to protect the interests of the creditors, the

underlying principle of a proper decree of sale would be this: *the decree of sale should have been shaped so as best to effectuate an advantageous sale of every asset of the corporation.* Translated into practical effect, this means that the decree of sale should not have provided for the sale of cash, receivers' accounts receivable, government bonds and life insurance, either separately or in a lump sum, and certainly not together with miscellaneous pieces of real estate. They were liquid assets in the Receivers' hands. The merchandise inventory should have been sold in the wholesale market for which it was intended; every separate piece of real estate should have been sold separately, not at Newcastle, Pennsylvania, but at the places where the properties were respectively located; the Court should have decreed a separate investigation and sale of the majority stock, and the equitable claim to the rest of the stock of the National Steel Boiler Company.

The decree, we admit, might properly have provided for the sale of all of the assets and properties as an entirety for the purpose of effectuating the plan, *but only if the Court could assure itself beyond peradventure by way of an upset price, fixed upon a thorough and independent investigation, that the net result to the creditors would be at least equal to that obtainable as a result of fair and normal liquidaion.*

The manner of conducting the sale

The decree of sale contained elaborate formal findings and recitals and proceeded to fix the upset price for each of the separate parcels to be offered for sale and for all of the assets and properties as an entirety, as follows (R. 305):

"Parcel	A	$2,392,000
"	B	28,000
"	C	17,500
"	D	37,500
"	E	17,500
"	F	1,000
"	G	2,250
"	H	1,000
"	I	1,000
"	J	2,250
and Parcel K which is the total		$2,500,000"

The decree shows that: Parcel A comprised all the property situated at Johnstown and New Castle consisting of two plants at Johnstown, one at New Castle, an office building and numerous dwellings plus all the cash, Government bonds, receivables, inventory, cash surrender value of insurance policies, interests in Steel Boiler Company, patents, trade-marks, going business and every asset of every description other than the real estate and plant situated at places other than Johnstown and New Castle. Incorporated in the figure of $2,392,000 for Parcel A are items of cash, United States certificates, certificates of deposit, insurance policies, Receivers' accounts and notes receivable, and Receivers' inventory, aggregating approximately $4,500,000 (R. 321). The cash, United States certificates and other similar cash equivalent items amounted to $1,929,807.59.

It should also be noted that this item "A" virtually represents what was put into the National Radiator Corporation in 1927 by the old National Radiator Company plus what was put into it at that time by the Union Radiator Company which also had a plant at Johnstown, and that the security holders of the old National Radiator Company received at the time of the merger cash,

debentures and other securities issued to them by the defendant corporation for their properties amounting to more than $13,000,000 (R. 254).

Let us examine another parcel, for example their Parcel E. This consists of three pieces of real estate located at Chicago, the plant, the warehouse and the Edgewater Apartment Hotel, to all three of which the Court allocated an upset price of $17,500. The Chicago plant and the warehouse are carried together on the Receivers' inventory at $605,149.43 (R. 169). *All of these three parcels of Chicago real estate were decreed to be sold in one lot at a sale to be conducted at New Castle, Pennsylvania, for an upset price of $17,500.*

Parcels F, G, H, I and J, for three of which the upset prices were $1,000 each and for the other two $2,250 each, covered warehouses situated in several States in which there were no plants. These warehouses were included in the inventory at values of from about $30,000 to about $50,000 each.

Similar absurdities apply throughout.

The decree contained various provisions such as those relating to deposits by bidders, etc., which made it difficult for outsiders to become bidders although easy for the Committee to become so (R. 300-9).

True it is that the corporate assets were sold at judicial sale. But frankness would compel all to admit that the sale was wholly perfunctory and technical. No one could say that the making of this technical judicial sale in the manner in which it was conducted was any evidence of a genuine effort by the receivers or the Court to bring about a liquidation advantageous to the estate.

In the case of *Graffam* v. *Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839 (1886), the Court undid a judicial sale and said at page 186:

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

The Determination of the Upset Price

Let us examine more closely what the Court did in arriving at the upset price. The Court had made no appraisals of the various plants, warehouses, dwellings, office building, apartment hotel, machinery, patents and other miscellaneous properties of the corporation. The Receivers made no appraisals or other examination (R. 261).

There was no real evidence before the Court as to the value of the property, other than the important evidence of the original Bankers' Circular and the Receiver's inventory.

As of December 31, 1931 (the nearest date for which figures were available), the receivership had the following current assets (R. 257-8):

Cash	$852,096.29
United States Certificates of Indebtedness	980,000.00
Accrued interest thereon	6,124.97
Bank Certificates of Deposit	50,000.00
Cash surrender of Life Insurance	22,900.00
New York State Bonds	18,686.33
Accounts Receivable	858,992.41
Inventory (merchandise)	1,634,905.25
Total	$4,423,705.25

In addition to this, there were plants, warehouses, dwellings and office building carried in the Receivers' inven-

tory at $6,743,419.15 (R. 260). In addition thereto, there were the rights as creditor, majority stockholder and equitable owner of the rest of the stock of the Steel Boiler Company. In additon there were the patents, trade-marks and trade-names which with good-will were carried by the corporation at $6,634,501.90 as well as other items (R. 34).

The counsel, who appeared for the Reorganization Committee as well as for the Receivers, called to the stand Messrs. Robert S. Waters and Flershem (one the son of the chief proprietor of the business and the other a ranking officer and member of the Reorganization Committee) and Heiner (one of the Receivers) and, over the objection of this petitioner, asked them to tell the Court what they thought the upset price should be. Waters said $2,195,695 (R. 154). Flershem said $2,300,000 (R. 230). Heiner said $2,229,073.98 (R. 257). There was some variation (apparently a studied one) in the explanations offered in arriving at these virtually similar results. Their testimony may be summarized by the following table:

	Receivers' Books	Waters (R. 153-5)	Flershem (R. 230-1)	Heiner (R. 257-8)
Cash, Liberty Bonds, etc.	$1,929,807.59	1,929,807.59	1,929,807.59	1,929,807.59
Accounts Receivable	858,992.41	172,000.00	425,000.00	214,498.10
Inventory (merchandise)	1,634,905.25	327,000.00	480,000.00	163,490.52
Plants	6,743,419.15	500,000.00	0.00	500,000.00
All other assets (corporation books)	6,634,501.90	0.00	0.00	0.00
		2,928,807.59	2,834,807.59	2,807,796.21
Deduct cost of liquidating receivables and merchandise		635,000.00	750,000.00	578,722.23
		2,293,807.59	2,084,807.59	2,229,073.98

*Except for Heiner's, the final totals were wrong. That arose simply from the bad arithmetic of the other two.

This meant that the accounts receivable and the inventory (merchandise) in the hands of the Receivers were not assets at all but a large liability.

It may be noted in passing that at a meeting of the Reorganization Committee held on the 28th of November, 1931 (the minutes of this meeting are printed at R. 516-520), they considered "what would be the proper amount of the upset price in the event an upset price were insisted upon by the Court" (R. 518), and hit upon the figure of $3,600,000, inclusive of $1,400,000 cash (R. 519), the equivalent, of course, of $4,129,807.59 inclusive of $1,929,807.59 of cash. Mr. Flershem attended that meeting and approved the minutes (R. 520). Consistency required him to suggest to the Court the figure $4,129,807.59 instead of $2,300,000 and clearly he stultified himself.

It should here be pointed out that, as appeared by the testimony of Mr. Robert S. Waters, more had been collected on the accounts and notes receivable of the corporation between October 8, 1931 (the date of the receivership) and December 31, 1931 than such receivables were inventoried at as of the date of the receivership,—that is to say that the reserve for collectibility was so large and that they had collected so many of the accounts in full that the amount which they had collected exceeded the amount of the receivables after deducting the reserve (R. 214). It also appeared that the amount of the receiver's accounts receivable reflected a similar reserve. This was a 12% reserve. The testimony of the same witness also shows that by December 31 the bulk of the corporation's inventory (merchandise) which appeared at cost upon the inventory filed by the Receivers as of October 8, 1931, had been sold by the Receivers at cost plus 15% to 20% (R. 193-8). It follows, therefore, that the accounts receivable and the inventory which the Re-

ceivers had on hand at the time of the sale practically consisted of accounts receivable created by the Receivers and of goods manufactured by the Receivers.

The Receivers have therefore stated that they used the funds of this receivership to manufacture goods which they said cannot be sold for more than 10% of their cost and that they have sold merchandise manufactured by the Receivers to purchasers from whom they do not believe they can collect 25¢ on a dollar. They then said that it would cost them $600,000 or $700,000 to collect 25% of the receivables and 10% of the inventory. This was an amazing account of their stewardship for the Receivers to make to the Court which appointed them. But the Court accepted it and acted upon it.

The inventory figures filed by the Receivers show $6,743,419.15 for plants (R. 260). This figure is arrived at on the basis of the expert appraisal made in 1927 for the purpose of the issuance of these debentures, after giving effect to a depreciation of such appraisal values of buildings aggregating about 12½%, of some of the equipment aggregating about 40% and of some other of the equipment aggregating about 75% (R. 164).

The appraisal of these plants seems to have fairly reflected actual value for one of them was sold after the merger at substantially more than its appraised figure, *viz.*, the Utica plant sold for $733,000 (R. 167). The $6,743,419.15 represented the remaining plants at their appraised value, after giving effect to the cost of additional investments in plants, less the above stated depreciation.

This interest in the Steel Boiler Company which goes along with the rest is apparently of importance. As above stated, the Reorganization Committee so treated it, for in their printed circular to induce the deposit of debentures they referred to it as a valuable new depar-

ture in such a way as to induce the debenture holders to hope that because of it the huge deficits might be converted into profits. But the Court did nothing to ascertain its true value or to undo the apparently fraudulent transaction in turning over nearly half the ownership of it to a few corporate officers.

An examination of the evidence submitted by the complainants upon the question of upset price shows that it was designed apparently to comply with what they seem to regard as a judicial standard enunciated by Judge Wilkerson's ruling in the Chicago, Milwaukee & St. Paul mortgage foreclosure suit, *viz.*, that the upset price should be fixed at a minimum so low that it would shock the conscience of the Court to confirm a sale at a lower price. Reference to the opinion of Judge Wilkerson to that effect was read into the question propounded to their first and star witness Robert S. Waters (R. 151).

The following appears in the cross examination of this witness:

> "Q. We will have to put it this way: That you are stating the price below which a court should not confirm the sale? A. Yes, that is right.
>
> Q. And should not, because it would be such a low price that even you, substituting yourself for the court, would say that you would be shocked at anything below that being acceptable to a court because of its gross inadequacy. Is that right? A. That is right" (R. 220).

That was the basis of their chief witness' testimony as to value. Their other witnesses who merely testified to the same effect, added nothing. The Court accepted the figure thus suggested without making any investigation.

As shown above the very doubtful principles adopted by Judge Wilkerson for the purpose of determining upset price in the Chicago, Milwaukee & St. Paul foreclosure do not in the least govern the proper determination of that question as applicable to the instant case. The assets in the instant receivership were susceptible of normal liquidation. The testimony offered therefore to justify the acquisition of the property of this corporation for a grossly inadequate consideration is wholly inapplicable and worthless. But it should be noted that for the properties sold under Judge Wilkerson's foreclosure decree that Judge fixed an upset price aggregating $122,000,000,—no paltry sum.

Since the Court below could not rely upon the disinterested assistance of its Receivers in advising and assisting the Court for this purpose, obviously the Court should have taken the official figures which were before it or appointed independent and competent appraisers to appraise the properties. But as above stated, the Court made no independent investigation of values and instead went into the realm of pure speculation and arbitrarily fixed upon the figure $2,500,000 which was but 10% of the valuation placed upon the assets in 1927 when the same interests who have now acquired the property sold us the debentures.

Upon the state of the record the assets should have been taken as follows for the purpose of establishing the upset price:

The current assets of a readily liquidable value of $4,423,705.25 should have been taken at that figure.

The plants, warehouses, dwellings and office building which are set out in the Receivers' inventory at $6,743,-419.15 (R. 260) should have been taken at that figure.

As to the assets, such as the Steel Boiler Company, patents, trade-marks, trade-names, etc., these no doubt

have substantial values. We have already commented upon the Steel Boiler transaction. Until very recent years the corporation conducted an advertising campaign on the basis of over $100,000 a year. It has a broad distribution of its products and its trade-names are well and favorably known (R. 239). As to the patents there is but little before us, but it is fair to presume that as the testimony shows that the corporation maintained an experimental laboratory (R. 202), patents and exclusive processes may have been evolved having very considerable value. It may be noted that the receivers obtained an order permitting the retaining of patent counsel (R. 3). The only figure that there is as to such assets is the $6,000,000 odd at which these assets were carried upon the balance sheet of the corporation. The Receivers' inventory omits to mention these assets. But the question of the value of these assets becomes academic if the Court had proceeded in the manner above set out in respect of the other assets. For then the aggregate value would be greater than the indebtedness and beyond that point the interest of the creditors ceases.

Nor would the winding-up of the receivership upon the basis of the payment to the dissenting creditors in full be other than it should be. Even after the operating loss of $5,000,000 of their $25,000,000 of assets with which they started in 1927, there should still be $20,000,000 left. We are but using the figures upon which they sold us the debentures. The protagonists of the Reorganization Plan seem to believe that this $20,000,000 of property can be operated by them at a profit. If so, there is certainly nothing excessive in the idea of their paying $11,000,000 for it,—even upon a judicial sale.

We submit further that the Plan of Reorganization itself ridicules the upset price of $2,500,000 fixed by the

District Court. The Plan calls for a new capital structure approximately as follows:

	Authorized	To Be Presently Outstanding
5% Debentures	$5,500,000.	$5,358,000.
$7 Preferred Stock (without par value)	55,000 shares	53,580 shares
Common Stock	400,000 shares	272,966 shares

If the assets were worth but $2,500,000 the new corporation would be hopelessly insolvent at its start. The 53,580 shares of preferred stock issued to former debenture holders would be worthless rather than having the liquidating value of $115 a share ascribed to them by the plan. The 400,000 shares of common stock would of course also be worthless.

The Court erroneously permitted the respondents to prove over the objection of this petitioner the quoted market of the debentures (R. 135-6). Apparently this affected the Court's mind in arriving at the upset price. It is significant that the upset price arbitrarily fixed by the Court was such as to make a yield to dissenting debentures of about their quoted market price.

Whatever the investment public's opinion of the fair liquidating value of a property in receivership may be, the public is loath to bid for securities of corporations in receivership. There are no quotations, therefore, excepting those that reflect the market which the management and bankers in control of the situation may see fit to create.

Furthermore, even in cases of corporations not in receivership, it is well known that during this depression their shares of stock have been selling in the public

markets at much less than the liquidating value of their assets.*

It is also a matter of common knowledge that the shares of stock of numerous investment trusts have at times during the depression been selling for substantially less than the aggregate market value of their portfolios of securities.

All this goes to show how irrelevant and misleading such testimony is and again demonstrates the error of the Court in disposing of this question.

The error of the District Court goes deeper than the Court's failure to obtain disinterested appraisals and conduct other appropriate investigations, such as the opinion of this Court in the case of *National Surety Company* v. *Coriell, supra,* clearly shows were requisite. We must say, with all due respect, that the District Court in its determination of the upset price was palpably autocratic and unfair. In the name of fairness, it was clear that the current assets alone, consisting of cash or cash equivalent $1,929,807.59, Receivers' receivables after the allowance of 12% reserve for collection $858,992.41, and Receivers' merchandise at cost $1,634,905.25, but saleable in the regular course of business at prices 15% or 20% above cost, should have been taken at something substantially the equivalent of the amount at which they were thus carried upon the Receivers' books, *viz.* $4,423,705.25; and that the seven

*In an illuminating article by Benjamin Graham entitled "Inflated Treasuries and Deflated Stockholders", appearing in the June 1, 1932 issue of Forbes Magazine at page 11, the following appears:

> "A study made at the Columbia University School of Business under the writer's direction, covering some 600 industrial companies listed on the New York Stock Exchange, disclosed that over 200 of them—or fully one out of three—have been selling at less than their net quick assets. Over 50 of them have sold for less than their cash and marketable securities alone."

This article and two others by the same author in the June 15 and July 1, 1932 issues of the same magazine are supported by tables setting out the facts in connection with many named corporations.

large and important plants with their equipment, the six separate warehouses, the numerous dwellings and the Johnstown office building appearing upon the Receivers' inventory after very large depreciations at a valuation of $6,743,419.15, should have been put into the calculation at, at least, some decent figure, even if only a third or so of the $6,743,419.15; and that some substantial figure, even though a comparatively modest one, should have been ascribed to the other numerous miscellaneous assets, such as the interest in the Steel Boiler Company, the apartment hotel at Chicago, the patented processes and devices; with the result that an upset price of not less than three times that fixed by the Court would have been fixed. By such rule of thumb method, a rough estimate might have been reached which could be stated with some show of reason to have been fairly in accord with the result that complete appraisals and investigation might have produced. Although a determination arrived at in that manner would still have been most irregular and have constituted a speculative and dubious remedy, it would at least have evidenced an attempt to give the creditor beneficiaries of the trust substantial justice.

The opinions of both the Courts below show clearly that these Courts were laboring under a fundamental error in that they determined the matter as though it were the trial of issues in an ordinary lawsuit between this petitioner on the one side and the complainants, the corporation and the Trustee on the other. The Courts below put much reliance upon the fact that the Reorganization Committee offered themselves as witnesses to give their opinion as to the appropriate upset price at which they should be permitted to buy the property, and that, as these petitioners did not offer witnesses to testify otherwise, the matter must be disposed of as though an issue were presented for adjudication upon

uncontroverted testimony. *This means that this creditor, who is a beneficiary of the trust fund and who was beseeching the Court to perform its trust duty to it and to the other creditors, must, at its own expense, call experts to come forward with appraisals of elaborate plants and plant equipment located in nine different states, as well as experts with opinions upon the value of other property. The expense of such an undertaking might well approximate the face value of the claim of this objecting creditor, even though its claim is of a comparatively large amount. No holder of relatively few debentures could afford to undertake the burden and expense of thus protecting the trust fund in the interest of all the other debenture holders. In any case it is not their duty but the duty of the Court, the judicial trustee.*

The decree indicates that the Court has in mind the use of the fund to the extent of as much as $300,000 for administration allowances (R. 307). The decree shows that the Court has in contemplation the making of these allowances to the Reorganization Committee, the Receivers, the Trustee, and their respective counsel (R. 309), all of whom were seeking, not to defend the trust, but to defeat it by having the Court turn over the trust fund to their nominee at as low a price as they could induce the Court to fix. The Courts have proceeded thus far in the case upon the basis that several hundred thousands of dollars of the fund may be made available for allowances, etc., for those who stand in the position of seeking to defeat the trust and the rights of the trust beneficiaries, while any of the trust beneficiaries who seek from the Court a true administration of the trust are told that, if the trust is to be protected, this must be done at their individual expense.

It is submitted that the upset price fixed by the District Court at $2,500,000 was grossly inadequate

and the procedure of the Court in arriving at it improper, and that the final decree of sale was erroneously framed merely to effectuate the reorganization plan and without proper provision for a fair and normal liquidation or its equivalent.

POINT II

The courts below erred in approving the plan in that the plan failed to give full recognition to the rights of creditors while reserving in the stockholders unconditionally an interest in the assets of the corporation; and in that the plan discriminated between general creditors of the same class by providing for the payment of some of them in full in cash while only providing for others securities in the new corporation of comparatively little value.

A. The creditors' position must be fully preserved before any interest in the new company can be unconditionally given to the stockholders.

The Plan and Agreement of Reorganization, being for the benefit of stockholders as well as creditors, provides (R. 36):

> "To this end, the management (which includes the owners and representatives of owners of substantial amounts of the Debentures and the Preferred and Common Stocks) has requested the undersigned, Rudolph B. Flershem, Charles O. Cornell and John H. Waters to act as a Reorganization Committee to formulate and submit to the security holders a Plan of Reorganization designed to accomplish the objects recommended by the management."

On page 7 of the printed Plan (R. 41) will be found the following:

> "2. Holders of 7% Cumulative Convertible Preferred Stock of the Corporation will be entitled to receive for each share of deposited stock one share of New Common Stock."

An interest was also preserved for holders of common stock.

In *Northern Pacific Railway Company* v. *Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931 (1912), the Court said at page 504:

> "For, if purposely or unintentionally a single creditor was not paid, or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. *They were in the position of insolvent debtors who could not reserve an interest as against creditors.* Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid. Being bound for the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim, they were none the less bound to recognize his superior right in the property, when, years later, his contingent claim was liquidated and established. That such a sale would be void, even in the absence of fraud in decree, appears from the reasoning in *Louisville Trust Co.* v. *Louisville, N. A. & C. R. Co.*, 174 U. S. 683 * * *." (Italics ours.)

We submit that under the authority of this case, the Court may not frame a decree designed for the purpose of conveying this property to the Reorganization Committee or their nominee as a mere "step in effectuating the Plan and Agreement of Reorganization," which makes unconditional provision for stockholders while reducing the position of general creditors as such by one half. The appellant First National Bank of Cincinnati is a general creditor with the same rank and position as every other general creditor. In this corporation there is none but general creditors, the bulk of whom are debenture holders who have deposited their debentures with the Reorganization Committee, the rest of whom are debenture holders who have not deposited, and miscellaneous general creditors.

We are not overlooking what the Court said in the *Boyd* case at page 508, *viz.*:

> "This conclusion does not, as claimed, require the impossible, and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms of income bonds or preferred stock. If he declines a fair offer, he is left to protect himself as any other creditor of a judgment debtor; and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it."

Nor are we overlooking the decisions which have since been made in the railway foreclosure cases applying this qualification. See *Kansas City Southern R. Co.* v. *Guardian Trust Co.*, 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579 (1916); *Pierce* v. *U. S.*, 255 U. S. 398, 41 Sup. Ct. 365, 65 L. Ed. 697 (1921).

In *Kansas City Terminal R. Co.* v. *Central Union Trust Co.*, 271 U. S. 445, 70 L. Ed. 1028 (1926), the

Court referred to the *Louisville* case (which is the decision underlying the whole doctrine) and after quoting from it as follows at page 454, stated that *this doctrine is "fixed principle * * * and to it there should be rigid adherence."*

> "But 'no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lien-holders or general unsecured creditors and stockholders, he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.' *Louisville Trust Co.* v. *Louisville N. A. & C. R. Co.*, pp. 683, 684 (43 L. ed. 1134, 19 Sup. Ct. Rep. 827)."

But the solution permitted to be adopted in the railway mortgage foreclosure cases is worked out upon a set of legal and equitable rights entirely different from the legal and equitable rights involved in the instant case.

In the railway foreclosure cases, the legal right of the mortgagee to a foreclosure and sale overshadows the rights of the general creditors and stockholders.

Although as a strict legal right, the mortgagee is entitled to the foreclosure, the Court of Equity, whose jurisdiction the mortgagee invokes for this purpose, may see fit not to permit the ruthless assertion of this right. The Court will not overlook the fact that the property must be sold as an entirety and that the mortgagee is the only possible purchaser and that, therefore, the mortgagor has not the least possibility of protecting its equity. The Court of Equity has the power upon general principles to refuse its aid except upon proper conditions recognizing the other equities,—the equities of the general creditors and the stockholders. The terms which the Court of Equity imposes as a condition to the exercise of its equitable power become formulated in a plan of reorganization giving primary recognition to the bondholders with suitable recognition to the general creditors and stockholders. It is thus that in the railway foreclosure cases there is a clearer power in the Court of Equity judicially to deal with and approve a plan of reorganization and to decree a technical judicial sale as a step in effectuating it.

The case of *Phipps* v. *Chicago, R. I. & P. R. R. Co., supra,* which is cited in the opinion of the Circuit Court of Appeals and upon which the respondents chiefly rely, does not give the least countenance to a plan of reorganization, such as the one approved by the Court below. There are three vital distinctions. The first is that the stockholders were *not* given a "free ride", but were subjected to substantial presently payable cash assessments as a condition to obtaining stock in the reorganized corporation. The second vital distinction is that the *Phipps* case does not, as claimed by the respondents below, deal with a situation involving only general creditors. The case had to do with the reorganization of a trunk line railway which had a very large mortgage indebtedness.

The procedure in that reorganization was rather unusual as it was not carried out under a foreclosure of the mortgages, and the bonds were not disturbed by the reorganization. The property was taken over by the new corporation subject to the bonds. Securities junior to the bonds were given to the general creditors and the stockholders were permitted to subscribe additional capital for securities junior to the securities issued to the creditors. The third vital distinction is that the subject matter of that suit was a railway.

We do not believe there is an authoritative judicial decision, whether in railway foreclosure cases or in other cases, giving countenance to a reorganization plan which, while writing down the interests of creditors, gives the stockholders a free ride. But it is a rather usual thing to make provision that the stockholders are to have the privilege of subscribing to junior securities of the new corporation.

The participation by stockholders in a situation such as the instant one, if permitted at all, should be conditioned upon the payment of some substantial sum and upon an underwriting of a fair amount of additional capital.

If those who are responsible for this ill-conceived merger and who are now seeking to carry out the Plan of Reorganization and the continuance of this unsuccessful business had seen fit to create a substantial fund of new money sufficient to cover several years of prospective deficits, it would constitute some justification for the plan, but as it is, they insist upon continuing the business at the sole risk of the debenture holders, while giving the stockholders a free ride.

It should be noted that under the Plan of Reorganization, the debenture holders are required virtually to make a complete surrender of their position as creditors.

Although to the extent of 50% of the present face amount of the debentures, the plan provides for new debentures, these new debentures are income debentures or virtually preferred stock.

Under the plan, the old management are in a position to continue the operation of the enterprise, their past record in the management of which has shown nothing but deficits, until the whole creditors' fund is completely wasted.

Is a dissenting creditor, who urges his legal right to present satisfaction out of the corporate assets, rather than standing aside indefinitely while the waste is completed, to be condemned as an obstructionist? And are Equity Courts autocratically to deprive him of his legal rights on pain of his acquiescence in the desires of a group of the debenture holders and stockholders to effectuate an ill-conceived reorganization?

The arrangement is most unfair to the debenture holders and other creditors and the Plan should not have been approved.

An underlying and fundamental error into which the Courts below fell, in approving the plan and making the decree of sale for the purpose of effectuating it, was the gratuitous assumption that it was a constructive and beneficial thing for the corporation to be reorganized. We submit that Courts should not proceed upon such gratuitous assumptions. Where, as here, the business of an ordinary industrial corporation is a demonstrated failure, plans for its reorganization are not constructive or of a beneficial nature either for the creditors or in a broader economic sense. We submit it is better that, when, as here, such a business is a demonstrated failure, as much as possible of the creditors' moneys should be gotten out, and that any other course violates the creditors' fundamental legal right.

The Courts below laid much stress upon the fact that ninety odd per cent. of the debenture holders had acquiesced in the plan, almost as though that were conclusive of its fairness and propriety, and indicating seemingly the view that a majority of the creditors are entitled to any assistance which they may ask from the Court to effectuate their purposes. It is well, therefore, to consider how much significance should fairly be given to this circumstance.

When publicly owned securities in a corporation such as this are defaulted, the individual security holder has little choice of action. A reorganization plan proposed by the management and sponsored by the banking house of issue is adhered to generally as a matter of pure inertia. The plan is accepted by the rank and file for the simple reason that they have no other practical recourse or remedy.

In the instant case it is true that the debenture holders were given an opportunity to rally in protection of their interests under the standard of an opposition Protective Committee, but as soon as this movement gained strength the proponents of the plan were able to arrest it by inducing the "Protective Committee" to abandon their opposition, and thus the last practical opportunity for the ordinary debenture holders to make any choice was removed. The Reorganization Committee, whose expenses, as above stated, were underwritten by the corporation, agreed to pay the opposition "Protective Committee" $35,000 for "services" etc. in return for the "Protective Committee" turning over to it nearly $1,000,000 of debentures which had been deposited with the so-called "Protective Committee" and abandoning their opposition (R. 507-8). Lip service was paid to the request of the "Protective Committee" that changes in the plan be made, but these changes were immaterial and without substance (R. 363-5, 383-6).

True it is that a single creditor may come to the seat of the Court and seek to be heard. In the instant case this petitioner attempted to do that, to be confronted by the respondent's assertion that this petitioner did not have a right to intervene (R. 98-100). True it is also that after argument occupying a whole morning's session in court, this petitioner was permitted to intervene (R. 134), with the consequences above set out.

Nor should the judgment of the sponsors of such a plan of reorganization be regarded as conclusive under the circumstances. This is so for the reason that they are prejudiced. The plan of reorganization here was sponsored by those who sponsored the merger,—that is to say, the officers of the corporation and the banking house of issue of the $12,000,000 of debentures. Human nature being what it is, their reluctance to admit error in having brought about this ill-conceived merger would induce them to sponsor this ill-conceived reorganization, even if that were not the best thing to be done in the real interests of the creditors. Liquidation, though sometimes as here the proper measure, is always an heroic one. The management is further prejudiced because while the business goes on they will continue to enjoy their salaries.

The interest of stockholders is in every sense subordinate to the rights of creditors. We submit that under our system there is and should be no judicial process,—even including a Federal equity suit for the purpose of effectuating a Plan of Reorganization,—by which the stockholders of a corporation can bring about a conversion of its indebtedness for the stockholders' benefit. That was the clear purpose of this proceeding and the decree which was sought and obtained is clearly erroneous.

The stockholders here are in the position of insolvent debtors who cannot reserve an interest as against their creditors.

B. The plan discriminated between various general creditors of the same class by providing for the payment of some of them in full in cash while only providing for others securities in the new corporation of comparatively little value.

Other than for the indebtedness to the debenture holders and the $60,000 indebtedness to the petitioner, International Heater Company, the corporation at the time of the receivership had no creditors excepting for about $46,000 then owing to miscellaneous creditors, chiefly merchandise creditors. In view of the magnitude and scope of the corporation's operations it would seem that current liabilities would normally exceed such an amount and that the management, in anticipation of the receivership, had paid down its miscellaneous current indebtedness as closely as it could arrange to do. The plan contemplates the payment of all the creditors, excepting only the debenture holders and the International Heater Company, in full in cash, and it appeared in the proceedings below that this had been done.

While, as argued below by counsel for the respondents, the adopting of this course might seem good business from the standpoint of the objectives of the reorganization committee,—in that the management thus preserved the good will of the various concerns with whom they would need to continue friendly business relations, —clearly the discrimination thus brought about is without justification. The respondents below relied upon what they stated to be the six months' rule in respect to merchandise creditors. But, as is well established, this

rule has no application excepting to receiverships of public utilities. *Spencer* v. *Taylor Creek Ditch Co.*, 194 Fed. 635 (C. C. A. 9th 1912).

POINT III

The District Court erred in parting with the trust fund and directing the delivery of it to the new corporation, there to be consumed and wasted, after the appeal from the final decree of sale had been perfected, as the Court then had become powerless further to act in the premises.

While an appeal or writ of error which has been perfected is in force, the lower Court has no further jurisdiction in the case except to take appropriate steps to perfect the record to go to the Appellate Court or to protect the *res* pending the review. For this purpose an appeal is deemed to be perfected by the allowance thereof, the filing of the assignments of error, the approval of the required bond and the signing of the citation.

Hovey v. *McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888 (1883);
Newton v. *Consolidated Gas Co.*, 258 U. S. 165, 42 Sup. Ct. 264, 66 L. Ed. 538 (1921);
Merrimack River Sav. Bank v. *Clay Centre*, 219 U. S. 527, 31 Sup. Ct. 295, 55 L. Ed. 320 (1910).

In view of the fact that the appeal from the final decree of sale dated May 31, 1932, had been allowed, an appeal bond fixed, filed and approved, the assignments of error filed and the citation issued, it is clear

that the Court was without further power to act pending the appeal except to take appropriate steps in relation to the preparation of the record to be submitted to the Circuit Court of Appeals and to take appropriate steps to preserve the *res*. The Court was therefore without power to confirm the sale and to relinquish its custody of the assets to the new corporation, there to be *not* preserved but wasted. The decree dated September 8, 1932, was therefore clearly erroneous,—the Court below was without power to make it.

Apparently the complainants (the Reorganization Committee) thought that by inducing the Court,—notwithstanding the pendency of the perfected appeal from the final decree of sale,— to make the further decree of September 8, 1932, and thus bring about the relinquishment of the assets by the Court and the transfer of them to the new corporation, the higher Courts would be confronted with a *fait accompli*.

This petitioner did everything it could to have the corporate assets preserved in the Court's hands during the disposition of the then pending appeal from the final decree of sale dated May 31, 1932. It asked the District Court to refrain from making the further decree dated the 8th day of September, 1932 which directed the transfer of the assets by the Receivers to the new corporation, and cited to that Court the judicial decisions appearing on the previous page. When the District Court refused to do this, it sought a suitable dispensation from the Presiding Judge of the Circuit Court of Appeals, which was refused. The order of the Presiding Judge denying the application stated that the denial was upon the ground that these petitioners refused to give any "bond of indemnity whatever" (Supp. R. 564). As it clearly appeared in the written petition or application that the requisite appeal bond upon the then pending appeal from

the decree of May 31 had been filed and approved, this order did not, of course, intend to refer to that. The Presiding Judge made it clear at the hearing upon this application that he would require the petitioners to enter into an undertaking to save the new corporation harmless from all loss. These petitioners were not asking for a stay of the decree of sale from which the appeal had then been perfected. They were asking that the Court should refrain from making further decrees in violation of the rule laid down by this Court in *Hovey* v. *McDonald*.

CONCLUSION

The decrees of the courts below should not be permitted to stand.

Since the District Court, at the behest of the complainants (the Reorganization Committee), saw fit,—notwithstanding the pending appeal from the final decree of sale dated the 31st day of May, 1932,—to make its further decree dated the 8th day of September, 1932, directing the Receivers to convey to the nominee of the Reorganization Committee, *viz.*, the new corporation organized by such Committee, all of the assets of the corporation, and since, pursuant thereto, such assets have passed out of the hands of the Court and into the hands of the new corporation where they have since been subject to change and waste, the fund as it stood in the hands of the Court has ceased to exist, so that a direction by this Court that the fund be duly administered by the District Court has become impossible of actual performance.

Under the Plan of Reorganization, a share in the assets has been unconditionally reserved in the old stockholders, although the Plan provides for a reduction

of the interest of the creditors as such in the fund. Such stockholders stand "in the position of insolvent debtors who cannot reserve an interest as against their creditors," and this doctrine is the "fixed principle * * * and to it there should be rigid adherence."

It is respectfully submitted that this Court should under the circumstances apply the remedy used by it in the case of *Shapiro* v. *Wilgus, supra,* and in the case of *Northern Pacific Railroad Company* v. *Boyd, supra,* and direct that this petitioner have a lien upon the assets of National Radiator Corporation (Maryland), the new corporation, for the amount of the principal of this petitioner's indebtedness with interest, costs and disbursements including counsel fees. The new corporation has been admitted as a party to the cause. Although this Court in its most recent decision upon the subject *(National Surety Co.* v. *Coriell, supra)* did not apply this remedy, it should be noted, that, before the decision was made by this Court, the new corporation in that case had been decreed to be a bankrupt and a sale in bankruptcy had been made of all of its assets to purchasers who were not before the Court.

Dated, New York, October 16, 1933.

Respectfully submitted,

RALPH ROYALL,
MANFRED W. EHRICH,
of New York,
SIDNEY J. WATTS, of Pittsburgh,
Counsel for the Petitioner,
First National Bank of Cincinnati.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

BRIEF FOR PETITIONER INTERNATIONAL HEATER COMPANY

JAMES F. HUBBELL,
of Utica, N. Y.,
Counsel for Petitioner,
International Heater Company.

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Conclusion: The decrees of the Circuit Court of Appeals and the District Court should be reversed; and in view of the fact that this petitioner has diligently done all that it could do to prevent the transfer of the assets of the defendant to the new corporation and has failed, and as the new corporation is a party to this suit, a judgment should be entered against the National Radiator Corporation of Maryland for $60,000.00, with interest and costs and disbursements 28

IN THE

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OCTOBER TERM 1933.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, Petitioners, vs. RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.	No. 62.
FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, Petitioners, vs. RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.	No. 63.

BRIEF FOR PETITIONER

International Heater Company

This case comes before this Court on a writ of certiorari to the Circuit Court of Appeals for the Third Circuit issued May 27th, 1933. The decree to be reviewed was entered March 24th, 1933, and affirms a decree of the District Court for the Western District of Pennsylvania entered September 8th, 1932, confirming a sale by the receivers of the property of National Radiator Corporation and approving a plan of reorganization.

Opinions of the Court Below

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 64 Fed. (2d) 847. The opinions of Judge Gibson are not reported, but appear in the record at pages 280 and 463.

Jurisdiction

The jurisdiction arises from the granting of the writ of certiorari herein pursuant to Section 240a of the Judicial Act as amended by the Act of February 13, 1925.

Concise Statement of the Case

The complainants are a reorganization committee. They brought this suit to procure a sale of the property of the National Radiator Corporation as an entirety, for the purpose of carrying out their plan of reorganization.

The defendant National Radiator Corporation was organized in August, 1927, under the laws of Delaware, to acquire the property and business of six companies, all of which had been in successful operation over a long period of years. The combined earnings of the constituent companies before the consolidation had been much more than sufficient to meet the interest requirements on the $12,000,000.00 of debentures that were issued after the consolidation. Shortly after the consolidation, however, either through changed business conditions or through mismanagement, the company began to have heavy losses.

The defendant corporation lost $6,754,000.00 in three years, and the management, although the company still remained perfectly solvent, decided that a reorganization was necessary, and for that purpose requested John

H. Waters, chairman of the board, Rudolph B. Flershem, chairman of the executive committee, and Charles O. Cornell to act as a reorganization committee.

This reorganization committee formulated a plan of reorganization and obtained the consent of as many debentureholders and stockholders to its proposed plan as practicable and then brought this suit against the National Radiator Corporation, for the purpose of selling the corporate property so as to determine the amount to be received by those creditors who refused to assent to the plan. The corporation filed its answer, admitting all of the allegations of the complaint and joining in the prayer for relief.

Two receivers were appointed, who conducted the business from October, 1931, to March, 1932, apparently in the hope that the non-assenting creditors would see the light and consent to the plan. But as they did not, the receivers, represented by the same counsel who represented the reorganization committee, without notice to the debentureholders or other creditors who had not agreed to the plan proposed, applied to the District Court to fix an upset price and decree a sale. This was done and the sale was had and the property purchased for the reorganization committee and the sale confirmed.

The International Heater Company is not a debentureholder, but holds promissory notes of the defendant upon which there is due $60,000.00 and interest. Every other creditor not a debentureholder is to be paid in full; but this petitioner has been arbitrarily transferred from its own class into the security holder class.

Specification of Errors—Summary of Argument

1. The Courts below erred in permitting a sale to be made without giving the creditors an opportunity to be heard upon the question as to whether a sale as

an entirety was advisable and if it were, as to what the upset price should be. The District Court having before it only the evidence of those who were interested in purchasing the property as a whole at as low a price as possible, was naturally enough misled into including many unnecessary items in the sale and into fixing an inadequate upset price.

2. The Courts below erred in permitting every other creditor not a debentureholder to be paid in full, while compelling the International Heater Company either to make a permanent investment in its reorganized competitor or to accept a small and unknown percentage of its claim in cash.

POINT I

The creditors should have had notice of the application to sell the defendant's property and an opportunity to be heard as to the manner of selling and the amount of the upset price.

It is certainly desirable that stockholders and bondholders and debentureholders of an unsuccessful corporation should have a practical method of reorganizing the company by a suit in equity so as to continue the business if they so desire; but it is equally certain that those creditors or securityholders who wish to take their loss and get out should have an opportunity to do so; and they should receive in cash what they would receive if the company were liquidated in a manner to realize as much money as practicable. The difficult problem to solve is to determine how much they would receive on such a liquidation. Obviously if the corporation is to be reorganized the Court cannot conduct an actual liquidation. But the Court can ascertain roughly what the amount payable on a liquidation would be, by taking the evidence of those interested in a reorganiza-

tion and also taking the evidence of those preferring a liquidation. If the Court takes only the evidence of those interested in purchasing the property at as low a price as possible so as to continue the business, as was done by the District Court in this case, he naturally reaches the result that the property should be sold as a whole at a very low price. If the Court were to take only the evidence of those who desire to sell and whose witnesses would therefore fix the values at a very large amount, he would get an equally absurd result. Therefore, it is our contention that the only procedure for the Court to follow in order to do justice between these two conflicting interests, is to take the evidence of both and from that evidence to enter a decree as fair and just as circumstances permit. Of course this does not give an absolutely fair result, but it gives as fair a result as it is practicable to obtain, and certainly a much fairer result than taking the evidence of one side only.

The other petitioner, the First National Bank of Cincinnati, contends that the Court having taken custody of the property as trustee ought itself to make the necessary investigation to determine what is fair between those who desire to adopt the proposed plan and those who do not; that to require each small creditor to protect his own interest involves an expense disproportionate to the amount of many of the claims. Perhaps that is true. Certainly it is unfair to allow $300,000.00 of the purchase price (R. 307) to be used by the reorganizers to carry out their plan and allow nothing at all to the non-assenting creditors for the purpose of presenting their side of the case. Equitably the $300,000.00 should be taken out of the new corporation that presumably benefited by its expenditure and should not be paid by those who are injured by its expenditure. The present decree makes the non-assenting creditors alone pay their opponents expenses and allowances. We believe, however, that even though the Court does not itself have appraisals made and conduct an independent and impartial investi-

gation, but if it only gives all of the creditors an opportunity to be heard and to present their evidence in opposition to any proposed sale or plan, then they will find means adequately to protect themselves.

It cannot reasonably be contended that the District Court below did himself conduct an impartial investigation. All the testimony was given by those interested in selling the property in its entirety at as low a price as possible, and none by the creditors interested in selling it in any manner but at as high a price as possible. The testimony as to value was given by the president of the defendant, by his son, the vice president, and by the chairman of the executive committee, all vitally interested in the reorganization. The other receiver also testified but he was an attorney at law with no experience in the business (R. 256) and who, with the exception of the Johnstown and New Castle plants had never even seen the properties as to the value of which he was testifying. The attorney for the receivers was also the attorney for the reorganization committee.

Some of the evidence was taken at the office of the Bankers Trust Company in New York City and some at the office of the complainants' attorneys. Only the attorneys for the complainants, the defendant and the Bankers Trust Company were present at those hearings. Then the counsel for the First National Bank of Cincinnati fortunately learned of the proceedings and was present at the taking of the testimony before the District Court on March 3, 1932, and was permitted to cross-examine some of these interested witnesses. The International Heater Company never learned of the hearings until they were all over. It is plain therefore that the District Court did not act in a judicial capacity and try the issue between these parties; but simply assisted in one of the steps necessary to carry out the defendants' plan of reorganization.

These conflicts between those who desire to liquidate an

unsuccessful corporation and those who desire to reorganize it are bound to occur in many cases, particularly in times like these; and if justice is to be done it is necessary, as was said in substance in the *Coriell case* (289 U. S. 426) that the District Court adopt some procedure under which each of the parties may have a judicial determination of its rights. The Courts ought not to become simply a cog in the reorganization machinery.

It has been intimated that these petitioners are not worthy of much consideration, because as it is impossible to please everybody, and as 95% of the creditors seem to be satisfied these petitioners must either be acting in bad faith and trying unjustly to force a settlement, or are so unreasonable as to be impossible to satisfy. Neither of these things are true. It is not at all strange that the International Heater Company prefers any reasonable cash payment to investing in the securities of a mismanaged competitor; and we do not believe that any large portion of the creditors are really satisfied. In (a) and (b) below we shall give our reasons for this statement.

(a) *The objection of the International Heater Company to the plan is well founded.*

Its objection is fundamentally that the present management of the defendant, judging from its past history and present actions, can never be successful and the International Heater Company therefore does not wish to invest a dollar in that enterprise.

The constituent companies of the defendant had been in successful operation over a long period of years (R. 270). Their combined earnings had for the four years immediately preceding the consolidation averaged more than four times the interest requirements on the $12,000,000.00 of debentures issued (R. 271). The earnings of the defendant for the first four months of its existence in 1927 before "the management" had had time

to make changes, were $722,143.00 (R. 33). But the result for the next three years were the following net losses (R. 33):

1928	$1,343,491.00
1929	1,234,329.00
1930	1,453,870.00
	$4,031,690.00

Three of the Reorganization Committee say this sudden change from a large profit to a large loss was caused by "unfavorable competitive conditions in the industry" and "a drastic decline in residential building construction," afterwards "further aggravated by the industrial depression" (R. 33).

The name of the remaining member of that committee, however, appears signed to a statement that "adverse industrial conditions afford no proper alibi to the management of this company for their consistent record of failure, year after year"; that "during the last three years, competitive companies, under better management, have earned substantial profits." It gives as one of the reasons why creditors should not assent to the proposed plan the fact that the plan "fails to deal with the most vital question of management." It asks if the creditors "wish to perpetuate such a management" and sacrifice their rights so that that management may have a larger fund "to mismanage and fritter away." It says the losses have already been $6,574,000.00 and asks, "Are you willing to permit the balance of these assets to be mismanaged down to a zero?" (R. 385-386).

The International Heater Company is not willing to invest the funds it needs in its own business in a company whose assets it believes may be mismanaged down to a zero. It believes that it ought not to be compelled to make such an investment, but that it should receive the percentage in cash that would have been paid if the

defendant had been liquidated. And its view in that regard has not been changed by the fact that the men who signed this statement have turned over the debentures deposited with them to be used against the plan to be used by this "present management which proposes no remedy for its incompetence," in favor of the plan and to be counted among the 95% who are "satisfied." This change of heart on the part of this "Protective" committee did not change the facts as to the past history of this management. The International Heater Company was in the heating business and knew the facts. There was "unfavorable competition" before the consolidation as well as afterwards; and the years 1928 and 1929 were not years ordinarily included in "the industrial depression."

The danger of these *ex parte* hearings is shown by the fact that the Circuit Court of Appeals' opinion states as a fact that the defendant's difficulties were owing to a falling off of building construction, and "unfavorable competitive conditions," apparently without stopping to consider that some of the creditors believed and might have proved if they had had an opportunity that the losses were due mostly to mismanagement, and that therefore they considered the securities of the reorganized company of little value.

(b) *There is no good reason to believe that the holders of 95% of the debentures are satisfied with the plan.*

The fact that 95% of the debentures have finally been deposited under the plan really means nothing as to their being satisfied or as to the fairness of the plan. We all know how many holders of bonds and debentures send their securities to any committee, because they know of no better course to follow. They have not the resources to act separately. They do not know with whom to join to conduct an investigation. These debentureholders were told by the Reorganization Committee that if they did not join in the plan the only alternative was liquidation,

and that liquidation would "result in a very small payment to debentureholders and other creditors and might well prove disastrous, and would in any event leave nothing for the stockholders" (R. 35).

In the face of these statements, however, the holders of $851,000.00 face value of the debentures, or about 9% of them (R. 503), deposited them with a Protective committee to be used in opposition to the plan, but this Protective committee, without requiring any change in the management so severely criticized, except that Mr. Cahn, one of the committee, was to be added to the Reorganization Committee and the board of directors of the new company, upon being paid $35,000.00 for fees and expenses (R. 508), turned these debentures over to the Reorganization Committee to be used in favor of the plan. This 9% are part of the 95% classified as in favor of the plan.

It may well be, also, that some debentureholders were misled into depositing their debentures, for in March, 1931, when only a little over 60% of the debentures had been deposited, a letter was sent out by the Reorganization Committee with the following statement: "The corporation's present management assumed control of its affairs February 1, 1930. This is the same management which had active charge of the old National Radiator Company, of Johnstown, Pa., prior to its merger into the present corporation in 1927, and was responsible for building up that company over a period of years into the second largest earner in the industry" (R. 358); thus giving the impression that the management that was said to have been responsible for the company's losses had been changed. As a matter of fact no such change had been made. This same Johnstown management had been in charge from the beginning. Robert S. Waters, one of the receivers, had been vice president and general manager of the corporation from its organization to the receivership (R. 137). Carl E.

Resley, of Johnstown, Pa., testified that he had been secretary and treasurer ever since August 30, 1927, the time when the company was organized, except between January 1, 1929, and August 4, 1930, and that John H. Waters had been the chief executive officer (R. 129). John H. Waters had been chairman of the board from the organization of the corporation to the time of the application to sell; and after February 1, 1929, also held the office of president (R. 249-250). So if there was any change in the control of the corporation on February 1, 1930, it could not have been important.

The time taken and the strenuous efforts necessary to collect this 95% of debentures shows that the holders were not satisfied with the plan; but were afraid if they did not turn in their debentures they would get practically nothing.

If the District Court had given notice before the sale that he would conduct a real hearing as to what should be done with the property in his custody, then the creditors would have had a chance to act intelligently instead of being driven into the corral. There ought to be a procedure established, if it is not already well established, that every creditor should have his day in court on the question of the disposition to be made of his debtors' property; and he should not be refused a hearing and treated with disdain on the ground that he is interfering with a reorganization plan that large interests desire to have adopted.

(c) *The decree of sale was unfair and erroneous.*

It is undoubtedly possible that there might be a case where although parties were not given an opportunity to be heard, they nevertheless suffered no harm because the decision made was correct. That, however, cannot be true in this case, first, because it is impossible to know what the evidence is that would have been offered by the non-assenting parties if they had had an opportunity to offer

any, and secondly, that even on the evidence in this record, all given by the parties interested in selling at a low price, it is plain that the decision is not correct, but erroneous; for even that evidence shows that (1) there should have been a partial liquidation instead of a sale of all of the assets; (2) the sale should have been conducted so that there might have been an opportunity for real bids by persons other than this reorganization committee; and (3) the upset price should have been fixed at a higher amount.

1. *There should have been a partial liquidation.*

At the time of the application to sell there were on hand $1,929,807.59 of cash and items equivalent to cash. That amount of cash was not needed as working capital to conduct the little business that the company was doing. Two weeks after the appointment of the receivers they procured an order authorizing them to invest such amount of cash as was not needed for expenses and working capital (R. 521). They thereupon invested $1,030,000.00 (R. 257); and it remained so invested until the application for the sale. If this $1,030,000.00 was not necessary as working capital, why should it have been included in the sale? Apparently so that the upset price might appear reasonable, although in fact it was not reasonable, and so that the new company might in the future have ample working capital, if needed, without borrowing. As to the first reason, the courts ought not to assist in creating a deceptive upset price; and as to the second reason, if the new company is successful, it can obtain the necessary additional capital without withholding the money of these creditors, and if it is unsuccessful it will not need additional working capital.

There was also included in the property sold many other unnecessary items. Only two plants were being operated and those not nearly to their capacity. Apparently even under greatly improved conditions some of the plants would never be necessary. There should, therefore,

have been a real attempt to sell some of these separately. The Utica plant had been sold a short time before for more than $700,000.00 (R. 167), although it was a relatively small plant and its boiler manufacturing equipment was not sold but retained and taken to Newcastle. The defendant also owned warehouses in Chicago, Baltimore, Cincinnati, Richmond, Garden City and Washington, D. C., and an apartment hotel in Chicago (R. 141-142). It is evident that the business could have been conducted without some of these properties, which could, even in these times, have been sold for something and the proceeds distributed among the creditors, instead of being turned over to the reorganized corporation without any adequate consideration.

2. *The method of selling was too well adapted to exclude all bidders except the Reorganization Committee.*

The portion of the decree controlling the procedure of the sale occupies over twelve pages of the record (R. 297-309). It is complicated and enough to discourage anyone from bidding on a separate parcel. Moreover, it would be useless to bid on a separate parcel, because if the bid for the whole property (misleadingly called "Parcel K") is equal to or exceeds the aggregate of the bids for the separate parcels, then the bid for the whole, or "Parcel K," was to be accepted (R. 301).

The bid for the whole would almost inevitably be the larger unless the person desiring to bid on one of the separate properties should also be in a position to bid on "Parcel A," the upset price for which was $2,392,000.00 out of a total upset price of $2,500,000.00. This "Parcel A" included the two plants that were in operation, viz: the Johnstown and the Newcastle plants, and all of the quick assets, including the cash and equivalent to cash items, amounting to $1,929,807.59.

But for the privilege of bidding on Parcel "A," or any other parcel, one had to qualify (R. 302). The prospec-

tive bidder must, at least twenty-four hours before the sale, apparently so that the reorganization committee might have ample warning, deliver a pledge to make good the purchase and, unless they held sufficient debentures, as the reorganization committee did, must deposit cash or a certified check or checks for at least ten per cent of the upset price. Ten per cent of the upset price on Parcel "A" was $239,200.00. That was the amount, therefore, that a bidder must turn over to the receivers in order to be permitted to bid on this $2,000,000.00 of cash or its equivalent that was to be sold with the other assets, the cash items constituting about four-fifths of the upset price.

The purchaser was also "required to assume all obligations of the receivers under any then existing executory contracts, leases and agreements entered into, assumed or adopted by the receivers" (R. 306). As the District Court pointed out, this required the purchaser to some extent to buy "a pig in a poke" (R. 153). But Mr. Bennett, "who has been through a great many of these receiverships," thought that this was a very common form of decree; and the decree as printed was presented to the District Court and signed.

In the case of a sale that had to be brought before the Court for confirmation in any event and where there was therefore no opportunity for the purchaser to take an unjust advantage, it seems obvious that practically the sole purpose of these and other unreasonable restrictions scattered through this decree was to make it certain that the reorganization committee should get the property as planned.

3. *The upset price fixed by the District Court was obviously inadequate.*

The reorganization committee held a meeting on November 28, 1931, apparently for the purpose of planning the sale of the company's property. Among the things

considered was "the probable amount of the upset price" (R. 518). They estimated the liquidating value of the property at $3,600,000.00 (R. 518-519). They also considered the procedure and were advised that before the sale was held a hearing would be held as to the fairness of the plan and that notice would be given "to creditors and other parties in interest" (R. 518), and that then there would be "a final decree, fixing the date of actual sale." The District Court seems to have been much more favorable to them than was then contemplated because he made the final decree without the hearing and without the notice to creditors and fixed the upset price at more than a million dollars less than $3,600,000.00.

The defendant began business with assets of over $26,000,000.00 (R. 274). The plant values had been fixed by appraisal by Sanderson & Porter (R. 273). That these appraisals were then approximately correct is shown by the fact that the plant of the Utica Heater Company, which was appraised at $690,000.00, was shortly afterwards sold for $733,000.00, although the boiler equipment was held out of the sale and moved to Newcastle (R.); and this boiler equipment must have been of importance, for the Utica company made only boilers (R. 179).

By the time of the filing of the bill of complaint the book value of these assets had shrunk to $19,434,548.08 (R. 34). These are substantially what was sold for $2,550,000.00.

The receivers had at the time of the application to sell $852,096.29 in cash and $1,077,711.30 in the equivalent of cash, or a total of $1,929,807.59 of cash items. This the receivers conceded was worth its face value. Deducting that amount from $2,500,000.00, the upset price, leaves $570,192.41 as the price fixed by the Court for all of the other assets of this corporation. An examination of these other assets shows that several of them were alone worth far more than $570,192.41.

The receivers had accounts receivable amounting to $858,992.41, but they estimated that they could collect only one-fourth of this amount (R. 257). Most of these accounts had been created by the receivers themselves, for their sales from October 9th to December 1st, 1931, had been about $1,119,000.00 (R. 214). It is inconceivable, if they had used any care at all in selecting their credit risks, that only one-fourth of these new accounts so created by the receivers were collectible. If their statement is true, they should have been removed from their position as receivers. The theory that the accounts are uncollectible seems to be based upon the supposition that their customers would not pay a concern in liquidation as readily as a going concern; but we must keep in mind that most of these customers already knew when they purchased the goods that this concern was in the hands of receivers and might not continue to be a going concern, and we also know that a concern in liquidation has the advantage of being able to insist upon payment and to bring suit upon its claims without fear of losing the good will of the customer. If the receivers sold to solvent customers the accounts can be collected. If they have sold on credit $850,000.00 worth of merchandise which cannot be collected shortly after they made the sale, then they have wasted that amount of assets that belonged to the creditors, and they should be surcharged with the loss.

The receivers also had an inventory amounting to $1,634,905.25, or almost three times the upset price for the entire assets, excluding the cash items. But the receivers say that on liquidation this could only be sold for scrap (R. 257). If this testimony is true, what can be said in defense of using over a million and a half dollars of the creditors' money to create "scrap"; and how can the continuance of the business by such receivers under any circumstances be justified? No doubt it is true that on a liquidation this inventory would not bring as much as it would when sold by a going

concern, but to say that it is nothing but scrap is on the face of it prejudiced and unfair testimony; and the non-assenting creditors should have been given an opportunity to present to the Court evidence of its real value.

The receivers, however, made it appear to the Court that the corporation was worth less because it had these $858,992.41 and $1,634,905.25 items than it would have been if it had had no accounts receivable or inventory, because on the receivers' estimate these two items would bring to the corporation $214,498.10 for the accounts receivable and $163,490.52 for the inventory, or a total of $377,988.62. But it would cost $578,722.23 for liquidating, so that it would on this testimony have been cheaper to abandon the assets than to attempt to collect the accounts and sell the inventory.

Not only are the figures absurd on their face, but if we take into consideration the fact that there might be some loss in liquidation on the accounts receivable and a considerable loss on the inventory, nevertheless we must keep in mind that this buyer was not going to liquidate but was going to keep this business running and collect the accounts receivable in full and sell the inventory for approximately its face value. And if the business were so continued, then even the president of the corporation has to admit that the inventory can be sold without much loss (R. 253). Certainly if it could not, there was no justification whatever for the receivers creating it. If it could not be sold with the business continuing, then the expenditure of this money was pure waste.

As the business is to be continued by the reorganized corporation, and as these assets are to be sold for substantially their book value by the creditors who desire to continue the corporation, then in all justice and fairness the creditors who desire not to continue the corporation but to take the percentage they would receive on liquidation should have that percentage fairly deter-

mined after a fair hearing and should not be left to take practically nothing, on the theory that the business is to be liquidated, which it is not, and that if liquidated these assets would be "scrap," which is likewise not true.

The receivers also had on December 31, 1931, real estate, buildings, machinery and equipment having a book value of $6,635,842.84, which they say was worth on liquidation $500,000.00 (R. 258), although a short time before that the Utica plant alone, which was a relatively small plant, had been sold for $733,000.00. It is true that it is difficult to determine what the real value of these plants were, but the very fact that it is difficult makes it all the more important that the Court should have taken the testimony of both sides to the controversy and not have fixed the valuation on the testimony alone of those desiring to purchase.

The only real controversy before the District Court was as to the amount the creditors who desired to take their loss at the present time, whether through liquidation or otherwise, should receive. They desired to get as large a percentage of their claims as possible. Those who wished to continue the corporation and eliminate these non-assenting creditors were on the other hand desirous of paying them as little as possible. This was a very real controversy which a court has no means of determining with fairness and justice except by giving notice of a hearing for that purpose and giving the parties ample opportunity to present their evidence.

This failure to give the non-assenting creditors an opportunity to be heard was not a mistake or inadvertent, but was intentional. The petitioner, the First National Bank of Cincinnati, instead of being given notice, had to present its petition asking to intervene (R. 95-96). And not only the complainants but the defendant asked that that petition be dismissed; and the Bankers Trust Company denied its right to intervene. The petition of the International Heater Company asked that it be per-

mitted to intervene and offer its defense in the suit (R. 130-132). It was permitted to intervene but not to offer evidence (R. 133); which meant, in substance, that it could come into the suit and appeal without evidence except that introduced by its adversaries.

On the application to confirm the sale the attention of the District Court was called to the fact that that was the first opportunity the International Heater Company had had to appear in the proceeding and that if the Court desired to hear testimony as to the fairness of the plan, then the International Heater Company would like an opportunity to produce witnesses and introduce proof. The Court ruled that the petitioner might file any formal objections it desired, but that if it desired to introduce any testimony it must do so at that time (R. 394-396). Not having its witnesses in Pittsburgh, the petitioner was unable to introduce any testimony and its counsel could do nothing except as was done by the counsel for the First National Bank of Cincinnati in the former hearing, namely, cross-examine the witnesses sworn by the complainants.

Therefore, there can be no dispute about the fact that this petitioner had no notice whatever of the application to sell; and that after it was permitted to intervene it had no opportunity to offer evidence unless it had happened to have its witnesses in court on the day when the application to confirm the sale was returnable, although the receivers had then been conducting the business for about ten months and there was no apparent reason for haste.

We seem to have failed utterly in making it clear to the Circuit Court of Appeals that we had not had an opportunity to be heard. Speaking of the application to sell and the fixing of the upset price, that Court says the District Court "called upon all parties for evidence on the subject." The fact is this petitioner had no notice whatever of the application and only learned that there had been a hearing after it was all over, and then on

applying to the Court it was permitted not to offer any evidence but only to "intervene."

The opinion of the Court below goes on to say: "The complainants, at a hearing lasting four days, produced a mass of facts, figures and opinions; the objecting securityholders produced nothing." How could they produce anything when they did not even know there was a hearing? After they did hear of it they were not permitted to produce anything.

So, the opinion continues: "On the uncontradicted evidence, which was all he had to go on, the learned Judge set an upset price." If this petitioner had had any notice of the hearing or been permitted to offer any evidence after it did hear of it, this evidence would not have been uncontradicted and the District Court would have had a great deal more to go on.

Apparently if the Circuit Court of Appeals had understood the facts they would have decided in our favor for they seem to place much importance on the hearing and the evidence offered; but evidently did not understand that it was a hearing of one side only and that the other side had no notice whatever and therefore no opportunity to contradict the evidence introduced.

POINT II

The Courts below erred in permitting every other creditor not a debentureholder to be paid in full, while compelling the International Heater Company either to make a permanent investment in its mismanaged competitor or to accept a small and unknown percentage of its claim in cash.

The record does not show with clearness the origin of the International Heater Company's claim, nor of the facts regarding it; for this petitioner had no opportunity

to present evidence concerning it; but it did on the application to confirm the sale get into the record through the testimony of the president of the defendant corporation certain facts. It appears that at the time of the organization of the defendant the Lincoln Radiator Corporation was doing a successful business at Utica, New York, in the manufacture of radiation. The Utica Heater Company, the Continental Heater Corporation and the International Heater Company each owned one-third of the stock of the Lincoln Radiator Corporation. The first two of these became constituent companies of the defendant, National Radiator Corporation, which gave the defendant a two-thirds ownership in the Lincoln company. As part of the management of the defendant company which led to such remarkable results, the defendant closed the plant of the Niagara Radiator and Boiler Company, one of its constituent companies, at North Tonawanda, New York, in September or October, 1927, very shortly after the consolidation, although that was an old and successful company; and over the protest of the International Heater Company transferred the Lincoln company's business from Utica into this plant at North Tonawanda. The International Heater Company thus having its supply of radiation removed to a distance and its voice in the management of the Lincoln company practically destroyed, sold its interest to the defendant for what it could get and took five notes for $20,000.00 each in payment. Two of these notes were paid, and three remain unpaid. This reorganization committee insisted, and in this they have been so far upheld by the Courts, that while all of the other creditors except the debenture creditors should be paid in full, this petitioner should be arbitrarily put into the same class as the debentureholders who had voluntarily invested in the securities of the defendant.

It is to be inferred from the fact that at the time of the receivership this large corporation had creditors, outside of this petitioner and the debentureholders, with

claims amounting to only about $46,000.00, that this floating indebtedness had been reduced to that amount so as to conduct more easily this reorganization; and now this decree permits this remaining amount of indebtedness to be paid off, on the theory that it is good business for the reorganized corporation to have these debts paid and retain the good will of the various concerns with whom it had been dealing. There is no doubt about its being good business for the reorganized corporation to do this, in the same way that it was good business for it to purchase all of the defendant's property at less than its true value. But the question before the Court is not how the reorganized corporation can be best and most efficiently managed, but what is fair and just to all the creditors. We know of no rule of law, nor has any authority been cited in this litigation, showing that one creditor of a certain class can be discriminated against because its claim is larger than the others or because the reorganized corporation desires to retain the good will of the others but places no value on the good will of that particular creditor.

We seem to have been more successful on this point in the Court below than on our first point, because we not only succeeded in making clear what our point was, but that Court says the matter "is not free from difficulties" and that their trouble "has been in classifying the International Heater Company as a creditor, feeling that if properly classified its rights would be those of a class of which it is a member."

The Court below says, "It is not a merchandise creditor or a creditor in respect to debts currently incurred in the usual course of the corporation's business. It neither sold the corporation merchandise, nor rendered it service. It simply sold it shares of stock in another corporation." Therefore, they say, it is a general creditor and "stands on the same plane with holders of the debentures who, likewise, are general creditors."

Is this not a distinction without a difference? Are the Courts ready to establish a rule that the creditor who sold a thousand tons of coal shall be paid in full, but that the creditor who sold ten shares of stock must take a dividend that may be practically nothing? Is it the sale of stock alone that is to be thus discriminated against, or would the same rule apply to the sale of Liberty bonds? What is there so sacred in the sale of merchandise that gives the seller a first lien on the debtor's property?

The Court below goes on to say that "the International voluntarily became a general creditor of this corporation." This is another illustration of the difficulties that arise from our lack of opportunity to present evidence. The International did not voluntarily become a creditor. The consolidation gave the defendant two-thirds of the Lincoln company's stock and the power to mismanage the assets "down to a zero." Under these conditions the International salvaged what it could out of the Lincoln wreck, just as it is now trying to save what it can out of this wreck. It is voluntary only in the sense that it will not refuse to take whatever it can get.

We contend that there is no distinction at all between those creditors who sold the defendant pig iron and this one creditor that sold it stock. We believe, however, that there is a clear distinction between the security-holders who have voluntarily invested their funds in the defendant corporation and thus become more or less permanently interested in that enterprise, and those creditors like this petitioner that have only extended a temporary credit for what they believed was a short period of time.

While we find no case where this Court has definitely decided that such a distinction exists, it seems to us clear from the principles followed in prior cases of reorganizations that such will have to be the rule ultimately established.

In this case the debentures, except for the voluntary default for the purpose of this reorganization, would not have been due until August 1, 1947; while of the promissory notes held by the International Heater Company one was due December 31, 1931, one December 31, 1932, and the last one will be due on December 31, 1933.

The balance sheet annexed to the bill of complaint shows that the defendant could easily have paid the interest on the debentures and still have had over $1,000,000.00 in cash and over $3,000,000.00 of other quick assets. In other words, there was no necessity for a default in the interest payable at that time; and if there had been no default in interest, the principal would not have become due until 1947. The default was simply a part of the plan of reorganization. The purpose of the reorganization clearly appears in the record (R. 500). The chairman pointed out to the board of directors that "although the cash working capital of the company as shown by the balance sheet was reasonably ample, it was evident that, if the company were to do an increasing volume of business, it would require the use of all or a substantial part of its cash to carry larger inventories and receivables, and that it would also be necessary to make large expenditures for the design of new products and for equipment necessary in their manufacture." Otherwise, the chairman pointed out, "it might well prove to be impossible to maintain the company's competitive business as against other enterprises in the industry."

While the International Heater Company has no reason to object to a reorganization of the defendant corporation for the benefit of its stockholders and debentureholders if they desire so to reorganize, it has every reason to object to having its claim against this perfectly solvent corporation destroyed, and its money transferred to the defendant as reorganized, so that the International's competitor can "do an increasing volume of

business," "carry larger inventories and receivables" or "make large expenditures for the design of new products and for equipment necessary in their manufacture." Obviously, even if these things are for the benefit of the securityholders of this defendant corporation, they cannot benefit its competitor, the International Heater Company. If the defendant corporation needed increased working capital, that should have been furnished by those interested in the enterprise and not by the destruction through the Courts of the admittedly just claim of this creditor.

The International Heater Company has been placed in a worse position in this proceeding than it would have been if the defendant had become bankrupt, because if it had been adjudicated a bankrupt, there would have been a normal fair liquidation and distribution of its assets, and not a sale without bidders. The Court below, relying on the testimony of the defendant's officers, says the defendant was insolvent. If that were true and if it were insolvent to the extent that the Court below seemed to think, ought it not then to have been liquidated instead of reorganized? That Court was also much impressed by the supposition that 96% of the debentureholders had not protested; but it seemed to forget that 100% of the creditors who were not debentureholders and who were not to be paid in full, namely, the International Heater Company, were vigorously protesting.

This petitioner seems to have been caught in this case between the upper and nether millstones and left without a hearing or consideration of any kind. All of the other creditors in its class, that is, those that were not debentureholders, are to be or have been paid in full, and therefore have no interest in the proceedings. On the other hand, the whole reorganization plan is formed for the benefit of the securityholders, the stockholders and debentureholders. The plan which is annexed to the complaint says that "the management" requested

Messrs. Flershem, Cornell and Waters to act as a reorganization committee to formulate and submit to the securityholders a plan of reorganization "designed to accomplish the objects recommended by the management." The plan was to be submitted to the "securityholders" and not to this petitioner, and, of course, not to those that were to be paid in full. The committee's letter says that the board of directors and the committee are convinced that "unless this plan is carried out, the only alternative is liquidation, which will deprive all securityholders of any opportunity to participate in a revival of business following the present depression" (R. 36). In other words, while the corporation was not insolvent and could have kept on doing business, in which event this petitioner would have been paid, nevertheless the management have thought advisable that the right of this petitioner should be destroyed by a reorganization, so that the *securityholders* may have an opportunity to participate in the revival of business to follow the present depression.

The principle involved in the *Boyd* case (228 U. S. 482) goes much further than to establish a rule as to the relationship between stockholders and general creditors. It applies equally to the relationship between different classes of creditors. A plan that preferred unsecured creditors over bondholders whose bonds were secured by a mortgage would obviously be unfair and inequitable, for on a foreclosure sale the bondholders might well receive payment in full and the unsecured creditors receive nothing. The debentureholders in this case, however, are unsecured and have no preference. Their claim is that they are general creditors and that all creditors should be treated alike. In the case of a liquidation this would undoubtedly be true; but in a reorganization of a perfectly solvent corporation made for the benefit of these securityholders and against the interest of the short term creditors, we contend that it is not

true. The early maturity of the floating indebtedness constitutes a substantial and valuable preference to that class of creditors. That fact has been recognized by the defendant in case of all creditors except this petitioner with which it had had differences. It is perfectly plain that if this plan had not been adopted and the defendant had continued to do business until it did become insolvent, the International Heater Company and the other short term creditors would have been paid in full. At the time of the receivership the defendant had and it continued to have until the time of the transfer to the new corporation ample funds for that purpose.

When the securityholders decide to reorganize a perfectly solvent corporation because they believe that over a number of years it will be for their advantage to do so, they cannot legally or equitably deprive the creditors whose claims are due within so short a period that they would have been paid if the reorganization had not been made of this substantial priority, which was almost as great so long as the company remained solvent as if it were a secured claim.

This discrimination, intentionally or otherwise, against a single creditor, ought not to be permitted in any proceeding in any court of justice. All other creditors of the same general character have been or will be paid in full. Is it just or honest that this one creditor, because its claim is larger or because its relations with the persons running this reorganization were not so friendly, should be destroyed?

CONCLUSION

The decrees of the Circuit Court of Appeals and the District Court should be reversed; and in view of the fact that this petitioner has diligently done all that it could do to prevent the transfer of the assets of the defendant to the new corporation and has failed, and as the new corporation is a party to this suit, a judgment should be entered against the National Radiator Corporation of Maryland for $60,000.00, with interest and costs and disbursements.

Respectfully submitted,

JAMES F. HUBBELL,
of Utica, N. Y.,
Counsel for the Petitioner
International Heater Company.

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

BRIEF OF PETITIONER FIRST NATIONAL BANK OF CINCINNATI IN REPLY TO BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE.

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First National Bank of Cincinnati.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, *Petitioners,*

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, *Petitioners,*

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

BRIEF OF PETITIONER FIRST NATIONAL BANK OF CINCINNATI IN REPLY TO BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE.

The brief of these respondents under the title "Statement of the Case" at page 2 says that: "Respondents do not consider it necessary to include in their brief any statement of the case beyond the following corrections of inaccuracies and omissions in the statement of the case as set forth in the brief of the petitioner First National Bank of Cincinnati." They then devote their "State-

ment of the Case" (pp. 2-9) to pointing out what they choose to characterize as our "inaccuracies."

In view of this and of the fact that we spared no pains to avoid the making of any inaccurate statements of fact to the Court and that, upon carefully reviewing our brief and the record in the light of the criticism of these respondents, we still find that we have not fallen into any inaccuracies whatsoever, we beg leave of the Court to answer these criticisms and to justify our statement of the facts. For this purpose we will take up the criticisms in the order in which they are made.

They first criticize (p. 2) our statement that the suit resulted in the making of "a perfunctory judicial sale in a manner studiously designed to effectuate a transfer of all of the assets of the corporation to the nominee of the Reorganization Committee." At page 27 of our brief, after briefly analyzing the provisions of the decree in this respect, we put it that "frankness would compel all to admit that the sale was wholly perfunctory and technical." Our analysis at pages 25-27 is incomplete. For the sake of brevity we did not set forth at length all the facts which help to drive home the inevitable conclusion that the decree was studiously devised and constructed for such purpose. We referred, and refer the Court again, particularly to the provisions of the decree contained at pages 300-9 and submit that a reading of these provisions will demonstrate the inevitableness of our conclusion. Since our statement has been challenged as an inaccuracy, however, we direct the Court's special attention to two particular examples of these provisions. At page 303 of the record, there will be found a provision requiring 10% deposit of the upset price twenty-four hours before the time fixed for the sale. This meant that any prospective purchaser (other than a debenture holder)

to have his bid for any parcel mean anything, would have to deposit at least $239,200 in cash, which is 10% of the upset price upon Parcel "A". For, even if he desired only to become the purchaser of, for example, one of the less important parcels, his bid would be conditioned upon all the several bids exceeding any bid that should be made for the property as an enitrety, so that in order to acquire what he might wish to own he would have to be prepared finally to bid for the property as an entirety. None of these difficulties applied to the Reorganization Committee who were permitted to use debentures in lieu of cash. Another provision which is found at page 306 makes it one of the terms of sale that a purchaser "shall be required to assume all obligations of the Receivers under any then existing executory contracts, leases and agreements entered into, assumed or adopted by the Receivers." This must, it seems to us, keep away other bidders than the Reorganization Committee. These are merely particular examples illustrating the point which for the sake of brevity was not fully eluc dated in our main brief. And again, for the sake of brevity we let the matter rest by pointing out to the Court that this part of the decree has to be carefully read as a whole in order fully to see its true significance.

The next criticism (p. 3) is of our statement made at page 3 of our brief that "the same interests as those sponsoring the reorganization represented the corporate assets as having a value of approximately $25,000,000," and they refer to statements in a different form but to similar effect which appear at pages 10, 34 and 47 of our brief. We again call the Court's attention to the fact that the bankers' circular (R. 269-80), which contained the representation that the assets in 1927 had a value of approximately $25,000,000, emanated from the banking

houses of issue and from the corporation. The statement, in the usual way in such documents, incorporated a letter signed by the Chairman of the Board of the corporation, Mr. John H. Waters. One of the two banking houses of issue was the Trustee under the Indenture. The record also shows that the Reorganization Committee was set up as a result of a meeting of the Board of Directors of the corporation (R. 499-502), of which Mr. John H. Waters was then the Chairman, and that he is a member of the Reorganization Committee, and that the same trust company which served in the capacity of the banking house of issue and Trustee under the Indenture is serving as depositary under the Plan of Reorganization. Throughout the activities of accomplishing the Plan and in the suit, we find the management, the Reorganization Committee and the Trustee all cooperating for the same purpose. In this Court we find the Reorganization Committee and the Trustee, although filing separate briefs, both joining in defense of the proceedings below and of the Plan.

Our statement which they next challenge (p. 3) is that the Plan was "for the benefit of debenture holders and preferred and common stockholders." We direct the Court's attention to the Plan and point out that it provides (R. 41) that the preferred stockholders are entitled to exchange their shares for common shares of the new company unconditionally,—that is to say, without the requirement of their contributing anything by way of new capital. At this point, page 3 of their brief, they refer to: "the option given to the common stockholders to acquire a minority interest in the equity by putting up a substantial amount of new money." It should be noted that the common stockholders were not required presently to put up a substantial sum of money. If, in fact, all of

the common stockholders should exercise the privilege of acquiring the right to subscribe the aggregate amount presently payable for such privilege would be but $90,569 (R. 37, 41). Manifestly, this could not be fairly characterized as any substantial contribution of new capital justifying the continuation of this business with its history of huge deficits at the risk of the debenture holders' capital.

The next criticism (p. 3) is of our description of the receivership decree as "a decree * * * enjoining suits." The decree in paragraph 6 (R. 66) contains a broad injunction against "* * * all other persons * * * in any manner disturbing or interfering with the possession or management of any part of said property over which said Receivers are hereby appointed." Apparently these respondents interpret the decree as we do for the reason that, when they thought it wise to have the Trustee under the Indenture bring a suit against the corporation after the receivership in order to obtain a consent judgement upon the debentures, they deemed it necessary first to obtain an order from the District Court permitting such suit to be brought (R. 80).

Our statement next challenged (p. 4) is: that "the business as an entirety was a demonstrated failure." They admit that our statement of the fact that a loss of over $4,000,000 was incurred during the years 1928, 1929 and 1930, is correct. They say in extenuation that two of these three years were included in the great economic depression. We think it would be more in accord with the fact to say that one of them was. The years 1928 and 1929 are both fairly to be regarded as excellent business years. They say further that building construction was on the decline and that their line of business was therefore depressed. But it is fair to point out that

Mr. Cahn, who is one of the Reorganization Committee and one of the respondents, publicly stated when acting as a member of the opposition committee that "During the last three years, competitor companies, under better management, have earned substantial profits" (R. 385). The fundamental explanation of the deficits, we believe, is found in the following: The Vice-President and General Manager Robert S. Waters, when cross-examined upon the explanation of the fact that, although the profits of the first four months of the corporation's life, viz. September-December 1927 were rather handsome, the operations thereafter showed large deficits, said at pages 191-2:

> "A. I would say that it was due largely to the result of the consolidation, which meant that the new corporation could not continue to handle the type of business that was done by two of the predecessor corporations. In other words, the Niagara Radiator & Boiler Company and the Continental Heater Company business was largely made up of what they call mail order business and some 'direct to you' business, as they refer to it in the trade; whereas the other companies, particularly the National Radiator Company, sold direct to the heating contractor and the jobber. And that type of business handled by Niagara and the Continental, they simply had to give that up.
>
> Q. Why did you give up a business that was so lucrative that it would make $900,000 in one-third of a year, for the purpose of conducting business in such a fashion as to produce over a million dollars of loss?
>
> A. I have explained to you that the corporation couldn't carry water on both shoulders, that two of the units, two of the predecessor com-

panies, did a kind of business that could not be carried out by the consolidated corporation.

Q. Well, you carried the water on both shoulders for four months. Is that right?

A. We did.

Q. And you made $900,000 doing it; and then you let the water go off one of the shoulders, and since then you have been making losses of over a million and a half?

A. We were obliged to give up that class of business, yes.

Q. Obliged by what?

A. Customs of the trade; the jobbers and heating contractors, or so-called legitimate trade."

This, we submit is rather a conclusive demonstration of the fact that the business as an entirety was a failure; that the merger was an ill-conceived one; and that this reorganization of the business as an entirety was an ill-conceived reorganization. This does not mean, however, that all the values were destroyed or that more could not be salvaged from the situation than the cash, plus a very small percentage of the Receivers' accounts receivable and Receivers' inventory. The business of the old National Radiator Company, which was the chief constituent of the merger and for which cash, debentures and other securities aggregating $13,000,000 (R. 254) were issued upon the organization of the defendant corporation, had been a profitable enterprise. Intelligent treatment of the situation should have provided for the separation and reconstituting of this business in the Johnstown and New Castle plants as a separate concern. Intelligent effort properly directed might well also have resulted in the reconstitution of some of the other businesses and the use of some of the other plants for such purposes; or,

if not, the numerous and costly plants, warehouses, dwellings, office building, apartment house, etc., could have been divorced and put aside for gradual liquidation with a reasonable prospect of substantial salvage.

At this point (p. 4 of their brief), the respondents abandon for the moment their stated purpose of confining their statement of facts to pointing out our inaccuracies and go into a matter not adverted to in our brief, and they state: that the annual requirements for coupon and sinking fund payments under the Indenture were $1,094,429.50. They do this for the purpose of showing that the cash if used for these purposes would in time be exhausted. But when they thus depart from a criticism of the inaccuracy of our statements and make a statement of their own, we find that they fall into a misleading statement. While it is literally true that, according to the provisions of the Indenture, the annual cash requirements for these purposes were as stated, it is also a fact that these aggregate requirements were made up to the extent of more than $400,000 a year by the sinking fund requirements and that, under the Indenture, debentures could be turned over at their redemption value of 107½% in lieu of cash in satisfaction of the sinking fund requirements (R. 269, 279). It is also a fact that in February 1, 1931,—when, although the corporation then had in its treasury $1,701,899.94 of cash (R. 34), it defaulted in the semi-annual interest payment then due,—it did not default in the semi-annual sinking fund payment then due. This sinking fund payment was apparently satisfied by the turning over to the Trustee of debentures which the corporation had acquired; and it would seem that it had $158,000 of debentures still left (R. 108). The corporation could acquire debentures in the market for about 15% of their

face value and use them for the purposes of the sinking fund at 107½% of their face value. Even assuming that they may not have had in their treasury a fund of debentures sufficient to satisfy several more semi-annual sinking fund requirements, it would nevertheless follow that comparatively little more cash would be required annually to satisfy both their interest and sinking fund requirements than the amount necessary for the former, viz. about $700,000 a year. As a matter of fact, therefore, at the time of the deliberate default in the payment of the interest, there was enough in cash alone to make provision for these requirements for well over another ensuing period of two years.

Coming back to our inaccuracies, they next say (p. 4): "It is not true that 'the respondents, without notice to the creditors, submitted to the District Court the final decree of sale'." They then state that notice was given to all parties to the cause and refer to a record page which shows that the defendant corporation and the Trustee under the Indenture had notice. How can it be suggested that such a notice was equivalent to notice to the creditors? The Trustee was in reality only representing creditors to the extent that such creditors had assented to the Plan. It was sponsoring the Plan and cooperating with the Committee in bringing about its accomplishment and was in reality in opposition to the interests of the dissenting creditors. The real vice suggested in our brief was that notice was not given to the dissenting creditors, which is the only important thing. In fact, notice was not given to the dissenting creditors.

They go on at that point and then say (p. 5) that "In particular, notice was given to counsel for the petitioner First National Bank of Cincinnati although that institution was not at the time a party, and that institution as

an intervener was present by counsel throughout the hearing extending from March 3rd to March 7th, 1932, inclusive, and again at the argument on March 14, 1932." At other points in their brief they reiterate and emphasize the fact that there was such a full hearing and that we had notice and a full opportunity to be heard. The Circuit Court of Appeals also gave much emphasis to this. We think, therefore, the Court should know what happened. As the respondents indicate, this petitioner had just before the hearing filed a petition to intervene (R. 2), to which petition the Reorganization Committee, the defendant corporation and the Trustee all interposed answers (R. 97-101), and the solicitors were informed that this petition for intervention would be made returnable on March 3rd when there was to be a hearing in the suit. Upon March 3rd, counsel for this petitioner attended before the Court in support of the petition. Upon the opening of the hearing, the respondents handed to the Court a printed decree of sale 105 pages long, which counsel for this petitioner had never seen and of which it had never heard. They also marked in evidence voluminous depositions, of which this petitioner's counsel had not the least knowledge and of the taking of which there had been no pretense of notice to us. The respondents had their witnesses in the Court. The stage was all set for obtaining the final decree of sale. But they were to be the sole actors in the drama. They started to put in their evidence and to submit their decree of sale as though we were not in the Court room and they suspended only upon our insistence that we should first be heard upon our application to intervene, which we had come there to argue. This happened on a Thursday, March 3, 1932. The whole morning session was consumed by argument upon behalf of this petitioner upon

its petition to intervene and by the argument in opposition thereto of these respondents. Finally an order was made permitting us to intervene. Their witnesses were then heard during the afternoon of the 3rd and during Friday the 4th, and this intervenor was permitted to cross-examine. The next two days, the 5th and 6th, being Saturday and Sunday, the Court was in recess, but on the 7th the hearing was continued for long enough to take 18 pages of testimony (R. 249-67). Upon the closing of the hearing on the 7th, the Court directed that this petitioner would have one week to file a brief and fixed the 14th for argument. We have gone into this question at some length for the reason that over-statements as to the question of notice and opportunity to be heard and thoroughness and completeness of the hearing, etc. of a similar sort which were made in the briefs of these respondents in the Circuit Court of Appeals resulted in what we believe was a misconception and over-statement by that Court in its opinion as to the facts in this respect. The opinion of Judge Woolsey erroneously speaks of the hearing for taking testimony as lasting four days (R. 536). In fact it lasted about a day and a half.

Next they admit (p. 5) the fact that the Receivers and Reorganization Committee were represented by the same counsel, but point out that this counsel was formally appointed by the District Court. That would almost go without saying, for we believe it is well understood to be a universal practice that receivers apply to the Court for its approval in the selection of counsel. But we submit that this does not cure the duplicity of representation arising from the fact that the Receivers were represented by the same counsel as the Reorganization Committee whose objective was to acquire the receivership assets as cheaply as they could.

Their next criticism (p. 5) is of our reference to an apartment house as one of the assets embraced in the sale. We did not in our brief ascribe any value to this but mentioned it merely as an additional item. It was, however, admitted upon the stand by Mr. Robert S. Waters, who was the Vice-President and General Manager, that the equity in this apartment house was worth at least what it was carried at on the corporation's books, viz. $51,172.31 (R. 217).

They next refer to the National Steel Boiler transaction in the following words (p. 5): "The petitioner refers to the stock of National Steel Boiler Company as an additional asset. The uncontradicted testimony was that this stock had no value whatever." The uncontroverted testimony is, as pointed out in our main brief, that this National Steel Boiler Company was a corporation set up to manufacture steel boilers of a type which was a new departure in the business, from inventions made in the laboratories of the National Radiator Corporation by the officers and employees of that corporation, with capital furnished by the National Radiator Corporation, and that a bare majority of the capital stock was issued to the National Radiator Corporation and the rest of it was issued to a group of its officers who claimed to hold it in their own right (R. 200-3); and that this was referred to in the printed circulars addressed by the Committee to the debenture holders to induce the deposit of debentures in the following words: the corporation "has developed new and improved products of great promise including, among others, steel boilers." This petitioner besought the Court below as well as the Circuit Court of Appeals to undo this seemingly fraudulent transaction or, at least, investigate it further. But these requests were ignored.

At page 6 of their brief they state: "It is not true that the District Court 'did not secure an appraisal and acted only upon the so-called opinion of the purchasers'." They then refer to the inventory which the Receivers have filed to controvert our statement that there was no appraisal. But this inventory showed assets of $11,944,-244.38. Moreover it did not include many important assets. We have not heard these respondents suggest before that this should be treated as an appraisal for the purpose of determining the upset price, although we suggested that, in lieu of any other appraisal, it ought to have been so taken. They then at this point also refer to the testimony of what they claim to be the disinterested witnesses whom they called saying "Two of the witnesses owned no interest in the corporation, two were the Receivers themselves and only one of the witnesses as to value was a member of the Reorganization Committee." The fact is that they called Messrs. John H. Waters, Robert S. Waters, Rudolph B. Flershem and William G. Heiner. John H. Waters (whose testimony on this question was rather slight) was the ranking officer of the corporation and the chief holder of the securities and a member of the Reorganization Committee; Robert S. Waters, his son, is Vice-President, General Manager and also a Receiver; Rudolph B. Flershem is the second ranking officer of the corporation and a member of the Reorganization Committee; William G. Heiner is a Receiver. As above stated, these gentlemen were represented in their capacity as Receivers and in their capacity as Reorganization Committee by the same counsel. They end this up by saying: "In short, the District Court itself made a very full appraisal." We do not know what they mean by that statement. If they mean that there is anything whatever to indicate that the Court did otherwise than

act upon what was put before it by the Reorganization Committee, it is a misstatement.

They next state as follows (p. 7): "The statement is not correct that the Plan provided that 'the rights of the Debentureholders as creditors should as such be cut in half'." We submit that an examination of the Plan (R. 41) will show that this statement is in every sense strictly correct. The Plan provides that for each $1,000 debenture, the debenture holder is to receive $500 in face amount of a debenture of the new company and that the rest of his interest is to be represented by stock. Furthermore these new debentures were "income" debentures (R. 38). The management are put in a position under the Plan to use without interest the money of the debenture holders until the last dollar is wasted.

They next state (p. 7): "The Plan does not contemplate as the petitioner's brief states at page 48, 'the payment of all the creditors excepting only the Debentureholders and the International Heater Company, in full, in cash' and it does not appear from the proceedings below 'that this has been done' and, in fact, they have not been paid." The record shows that these creditors have been paid (R. 462).

They next state that "It is not correct that the fund of $300,000 paid in cash on account of the purchase price was reserved for administration allowances. It is in substantial part to be applied as the distributive dividend against $400,000 or more of claims of creditors (including petitioner) not participating in the reorganization." These provisions of the decree are elaborate and abstruse so that it is difficult for us to know just what they mean, but we gather that, as these respondents construe it, all of the $300,000 is available as administration allowances except to the extent necessary to provide a

distributive dividend to about $400,000 of dissenting creditors. Since the total amount of claims (chiefly debentures and defaulted coupons) aggregate more than $11,500,000 and the amount realized from the assets after administration allowances and possibly deductions for other expenses will amount to not more than a net of say $2,300,000, the percentage for distribution will apparently produce not more than say $75,000 for the non-assenting creditors. That would make a distribution of this $300,000 fund of, say, $225,000 to the Reorganization Committee, Receivers, Trustee and their respective counsel, and, say, $75,000 for the dissenting creditors.

They next state (p. 8) that our comment upon the capital structure of the new company as $16,000,000 is incorrect, and that "Apparently, the petitioner's computation assumes a wholly unwarranted capitalization of $115 per share for the no par value preferred stock and $20 per share for the no par value common stock of the New Company." Our computation does proceed upon such assumptions. We do not think that, in view of the fact that the Plan provides for a liquidating preference value of $115 a share for the preferred stock and ascribes a $20 per share valuation to the common stock for subscription purposes (R. 39, 40), the assumption is wholly unwarranted.

The next charge of inaccuracy (p. 8) is that "It is not true that the result of the decree of sale is to continue the business in the hands of the same management." It is too clear from the whole record that the Plan was originated, sponsored and carried out by and on behalf of the same elements who brought about the organization of the corporation and who have ever since been in control. To quote again from one of the members of the Committee themselves, namely Mr. Cahn, who it is true was

then a member of the opposition committee: "No Correction in Management.—The Plan completely fails to deal with the most vital question of management. The majority of the present Board of Directors were on the Board of Directors when these Debentures were sold to you in August, 1927."

AS TO RESPONDENTS' ARGUMENT:

I

Their first point is that the Court was justified in treating the corporation as imminently insolvent and in making the sequestration decree. We have made no point as to that. This petitioner has intervened and, under Equity Rule 37, we have believed that such intervention is "in subordination to, and in recognition of, the propriety of the main proceeding."

II

Point II is an attempt at justification of the action of the Court in determining the upset price. We have discussed this fully in our main brief.

III

Point III is entitled: "No creditor has a right to piecemeal liquidation." They state that this is the position which we have taken below and here. The position which we have taken in this respect throughout the litigation is set forth at page 25 of our main brief as follows:

> "The decree, we admit, might properly have provided for the sale of all of the assets and properties as an entirety for the purpose of effectuating the plan, *but only if the Court could assure itself beyond preadventure by way of an upset price, fixed upon a thorough and independent investigation, that the net result to the creditors would be at least equal to that obtainable as a result of fair and normal liquidation.*"

The respondents, and we must also say the Courts below, have seemed disposed to avoid the real issues in favor of dealing with fancied ones which seem easier to meet.

IV

In Point IV they deal briefly with our claims as to the propriety of the Plan in that (1) while writing down the interest of creditors, it unconditionally reserves an interest in the stockholders; and (2) it discriminates by paying some creditors of the same class in full in cash while permitting others only to receive the securities of the new corporation, or in lieu thereof to be relegated to the receivership dividend.

At this point they virtually admit that the Plan is defective in these respects and try to justify it by a *de minimis* argument. They say that the extent of the interest unconditionally reserved for the preferred stockholders in the new corporation is comparatively small, and also that the amount of cash paid to the creditors in whose favor the discrimination was made is rather slight. *But the aggregate amount of the interest unconditionally reserved in the preferred stockholders and of the arbitrary discrimination in favor of some of the general*

creditors is large in comparison to the amount of the claims of these dissenting creditors.

Conclusion

In conclusion they say (p. 32): "Not only does the petitioner refuse to take the same thing that the creditors who adhere to the Reorganization Plan are taking, but neither will it take the same thing (viz. a dividend) that the non-assenting creditors are willing to take." This is a strange statement. All know this grossly inadequate dividend was *forced* upon the non-assenting creditors, and it is just for that reason that we are here.

They then say at the bottom of page 32 and the top of page 33: "At the end of its brief it frankly asks for a direction 'that this petitioner have a lien upon the assets' of the New Company 'for the amount of the principal of this petitioner's indebtedness with interest, costs and disbursements including counsel fees'." Apparently they appear to regard this as rather a shock. It would seem that they feel that we are trespassing on their preserves in the suggestion that there should be an allowance for the counsel of this petitioner out of the $300,000 fund which has been reserved. They seem to think that it is in line with the usual procedure and therefore eminently proper that the Reorganization Committee and its counsel and the Trustee and its counsel and the corporation and its counsel should have recourse to this trust fund for their allowances. But as pointed out in our main brief, these parties did not seek a true administration of the trust; but on the contrary, a violation of it. In fact, the only party to the cause who has advocated or defended the interests of the creditor-beneficiaries is this petitioner.

They close at page 33 with the statement "Equality is equity and this petitioner does not seek equality but a preference. No creditor has a vested right to preferential payment." But we point out again that, under their Plan, they have preferred to us some of the creditors of the same class by payment in full in cash; also that, while reducing the position of the other creditors, including this petitioner, by half, they are reserving an interest in the corporate property in the stockholders whose rights are wholly subservient to those of creditors.

We again ask for the relief asked for at the conclusion of our main brief.

Respectfully submited,

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MAY 25 1933
CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

62+63

Nos. ~~962-963~~.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of NATIONAL RADIATOR CORPORATION and BANKERS TRUST COMPANY, Trustee, NATIONAL RADIATOR CORPORATION (Delaware), NATIONAL RADIATOR CORPORATION (Maryland), ROBERT S. WATERS and WILLIAM G. HEINER, Receivers, CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS AND FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

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Mellon, Director General, v. *L. E. McKinley* (1927), 275 U. S. 492 9

Metropolitan Railway Receivership (1908), 208 U. S. 90 6

Michigan v. *Michigan Trust Co., Receiver* (1932), 286 U. S. 334, at 345 4

Muller v. *Dows* (1876), 94 U. S. 444 6

Northern Pacific Ry. Co. v. *Boyd* (1913), 228 U. S. 482, at 508 18

Provident Life & Trust Co. v. *Camden & T. Ry. Co.* (C. C. A. 3rd Cir., 1910), 177 Fed. 854 9

Shapiro v. *Wilgus* (1932), 287 U. S. 348, at 356 5

United States v. *Butterworth-Judson Corp.* (1926), 269 U. S. 504, at 513 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 962-963.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of NATIONAL RADIATOR CORPORATION and BANKERS TRUST COMPANY, Trustee, NATIONAL RADIATOR CORPORATION (Delaware), NATIONAL RADIATOR CORPORATION (Maryland), ROBERT S. WATERS and WILLIAM G. HEINER, Receivers, CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS AND FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported, but printed copies have

been filed with the Record. The opinions of the District Court are not yet reported, but appear at pages 416 and 691 of the Record.

Jurisdiction.

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347a).

Introductory Statement.

The present petition is one of three applications by holders of approximately 2% in aggregate of the total outstanding indebtedness of National Radiator Corporation for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Third Circuit filed March 24, 1933, affirming a final decree of sale and the decree confirming the sale of the property of the debtor corporation, in a suit instituted in the United States District Court for the Western District of Pensylvania by the respondents as holders, under a Reorganization Plan, of more than 95% of the total outstanding indebtedness of said corporation. The two other applications are entitled, respectively, "Amy Arzt and Josephine Ramsey, Petitioners, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and others, Respondents," at No. 964, and "Lily Clapier, Petitioner, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and National Radiator Corporation, Respondents," at No. 965.

ARGUMENT.

FIRST: No novel or important question is presented by the petitioners.

This suit is the usual equity receivership proceeding, instituted by a general creditors' bill (as an evolution out of the judgment creditor's bill to supplement the writ of execution) for a sale of the corporate debtor's property.

> *Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265.

In the fall of 1930 it was apparent to those acquainted with the debtor's business that without marked improvement in business conditions, financial collapse was imminent (R. 49-50). In February 1931, after default actually occurred in the payment of interest on the debtor's outstanding Debentures, the Reorganization Committee was formed (R. 54) and later promulgated the Reorganization Plan (R. 55), under which were deposited more than 95% of such Debentures and substantial amounts of the preferred and common stock of the debtor corporation (R. 516). In October 1931 receivership occurred, followed by a sale of the debtor's property in August 1932, to purchasers on behalf of the Reorganization Plan, after the usual and orderly procedure in this regard prescribed by practice and the governing statutes.

In seeking a review of this proceeding, the petitioners aver none of the reasons stated in Paragraph 5 of Rule 38 of this Court. There is absent any conflict of decisions or any variance from established practice; no novel question is raised. Nor is this suit characterized by any of the

elements which prompted Mr. Justice Taft's remarks in the decision of *Harkin* v. *Brundage* (1928), 276 U. S. 36. There is no conflict of jurisdiction; the only question presented by the petitioners is whether jurisdiction has been fairly and equitably exercised. The propriety of the receivership itself has been recognized (R. 155-200). The Record shows the debtor's assets to be presently insufficient to pay even a quarter of its outstanding debt (R. 439, 698). Its $10,673,000 of Debentures have been matured (R. 432). Interest and sinking fund charges overdue and unpaid on those Debentures amount to more than $2,600,000 (R. 35). In this case there is the antithesis of the abuses censured by Mr. Justice Cardozo in his opinion in *Michigan* v. *Michigan Trust Co., Receiver* (1932), 286 U. S. 334, at 345. Here, *bona fide* creditors have instituted suit and not to hold creditors at bay, but as creditors to enforce their claims against their debtor; not to conserve for the debtor, but to seize and sell in satisfaction of their claims, the debtor's assets; not to continue a tottering business, but, in the only practical way possible under prevailing economic conditions, to realize upon their debtor's business, which remains of importance in the radiator industry, but is unable under prevailing economic conditions to meet its overwhelming fixed charges (R. 50, 164, 209). The very decrees which the petitioners attack cut off effectively every interest of the debtor in that business and transfer its assets to the creditors. This is precisely the type of equity proceeding which had Mr. Justice Cardozo's approval when he said:

> "It is one thing for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at

> large. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380. Whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary." *Shapiro* v. *Wilgus* (1932), 287 U. S. 348, at 356.

The only delay and hindrance to creditors existing today in this suit is occasioned by the few who are petitioning this Court. Delay of more than two years in effectuating a reorganization has already done incalculable harm to the great majority of creditors. Further delay may deprive them now of what salvage through reorganization they may have. If the present Plan fails, they have no plan.

SECOND: The petitioners attempt to raise for the third time, under the guise of questions of law, issues of fact twice disposed of adversely to them by the Courts below.

Throughout the lengthy course of the orderly proceeding had in the Courts below the petitioners had "their day in Court"—many days, in fact. Of the contentions then presented by the First National Bank of Cincinnati, as intervening defendant, the District Court said (R. 417):

> "It did not undertake to deny that the defendant company had lost in operation about $1,500,000 for each of the last three years preceding the filing of the bill of complaint, or that it was moving toward inevitable bankruptcy when the instant suit was instituted. The most tangible effort of the intervening defendant was put forth in an effort to have a large 'upset' price fixed by the Court in ordering a sale of the defendant company's properties. . . .
>
> "In our opinion, the evidence has disclosed no

> fraudulent collusion between the plaintiffs and defendants. It does show, we think, a very present need for reorganization of the Radiator Corporation, and the means suggested in the bill seem to us to furnish a reasonable chance to avoid further loss by creditors. The holders of a small proportion of the company's indebtedness do not agree with this opinion, and such creditors are entitled to consideration by the Court. This does not mean that we should overturn the plans of the great majority of the creditors to save some part of their claims unless those plans unfairly encroach upon the rights of the minority claimants. In the instant case we discern no such encroachment. All the creditors were given the opportunity to participate in the plan of the majority. The small minority did not want to participate in the reorganization plan of the majority. Under such circumstances the rights of the minority creditors seem plain. They are entitled to recover the amount of the indebtedness to them by judicial sale of the properties of the defendant, or, in event those properties are fairly sold for less than the total indebtedness of defendant, for that proportion of the net proceeds of the sale which their claims bear to the total indebtedness."

This opinion is in conformity with the unbroken line of decisions of this Court, which satisfactorily dispose of every question of law and of fact presented by this case.

Muller v. *Dows* (1876), 94 U. S. 444;
First National Bank v. *Shedd* (1887), 121 U. S. 74;
Hollins v. *Brierfield Coal & Iron Co.* (1893), 150 U. S. 371;
Re Metropolitan Railway Receivership (1908), 208 U. S. 90; and see

United States v. *Butterworth-Judson Corp.* (1926), 269 U. S. 504, at 513.

The upset price was ascertained in conformity with the principle stated in

Guaranty Trust Co. v. *Chicago M. & St. P. Ry. Co.* (N. D. Ill. E. D., 1926), 15 Fed. (2d) 434.

The sale itself is sustained by

Fearon v. *Bankers Trust Co.* (C. C. A. 3rd Cir., 1916), 238 Fed. 83.

But the petitioners contend that no plan of reorganization is fair which lacks their approbation, as the opinion of the Circuit Court of Appeals in the instant case points out:

> "The appellants, however, while declaring the plan of distribution unfair, are opposed to any plan because they say neither this one nor any other can hold out a promise of success. Therefore they insist upon immediate and complete liquidation of the corporation's assets. Notwithstanding the lack of purchasers and the probability of receiving nothing, they take the stand that they prefer, and in law have a right, to know and accept their fate now.
>
> "We are constrained to hold, however, that as against the rights of all other creditors they cannot in equity prevail.
>
> "In reaching this judgment we have brought into force no new principles of equity. We have simply applied to new facts old principles found in the zone in which the Boyd, Phipps, Luhrig Collieries, Pusey & Jones and Shapiro cases are landmarks."

But the petitioners further contend that the assets in the custody of the District Court constituted a "trust

fund". If this is not a matter of mere nominalism, the trust, if there were one, was a trust for the benefit of all creditors and the terms and conditions of such trust are to be found, not in any trust instrument, but in the well settled principles of equity. These principles have been strictly followed, and in following them the District Court has faithfully performed its trust. If now, to obscure these principles, the petitioners seek a review for the third time of the facts underlying this case, they must recognize the equally well settled rule that this Court will not disturb a finding of fact made by a District Court, in equity, concurred in by the Circuit Court of Appeals, except in case of clearest error.

Graffam v. *Burgess* (1886), 117 U. S. 180;
Charleston Mining Co. v. *United States* (1927), 273 U. S. 220.

All seven questions presented by the petitioners resolve themselves, upon analysis, into but four questions of fact:

(a) Has there been dereliction in the judicial administration of this receivership estate?
(b) Was there error in the entry of a decree of sale (instead of some decree requiring piecemeal liquidation)?
(c) Was the Court without authority to confirm the sale decreed?
(d) Is the Reorganization Plan unfair?

Of the Reasons For The Allowance of The Writ urged by the petitioners at page 13 of their petition, their (1) embraces their affirmation of questions (a) and (b); their (2) their affirmation of question (d); their (3) their affirma-

tion of question (c). As to every one, the Circuit Court of Appeals has held to the contrary. The very purpose of legislation restricting obligatory appellate jurisdiction was to make final the decisions of the Circuit Courts of Appeals, said Mr. Justice McReynolds in his testimony before a subcommittee of the Committee on the Judiciary of the United States Senate February 2, 1924,

> ". . . the theory being that after two trials in a Federal Court as of right (one in the District Court and one in the Circuit Court of Appeals) the matter should end, subject to a discretionary review in the Supreme Court for some superior reason."

This superior reason, the petitioners fail to disclose. If they seek to review findings of fact, however, this Court will not refuse a reference to the Record to correct by restatement certain inaccuracies and omissions of their petition and brief.

A. W. Mellon, Director General, v. *L. E. McKinley* (1927), 275 U. S. 492.

It may not be inappropriate at this point to call attention to the fact that the petitioners, who have intervened in this cause as parties defendant (R. 155-200), in taking their appeals from decrees of the District Court, failed to join in these appeals their co-defendant National Radiator Corporation or to obtain a severance. Motion was made to dismiss their appeals, therefore, in the Circuit Court of Appeals, on the ground that their appeals, in the absence of a summons and severance, were fatally defective, under the rule laid down in the following cases:

Provident Life & Trust Co. v. *Camden & T. Ry. Co.* (C. C. A. 3rd Cir., 1910), 177 Fed. 854;

American Baptist Home Mission Society v. *Barnett* (C. C. A. 2nd Cir., 1928), 26 Fed. (2d) 350; certiorari denied (1928) 278 U. S. 626;

Doran v. *Charles D. Kaier Co., Inc.* (C. C. A. 3rd Cir., 1932), 60 Fed. (2d) 259.

This is the well established rule of this Court.

Davis v. *Mercantile Trust Co.* (1894), 152 U. S. 590;

Hartford Accident Co. v. *Bunn* (1932), 285 U. S. 169.

In the latter case this Court, speaking by Mr. Justice McReynolds, said (quoting from a prior opinion of this Court, at page 181 of the Report):

> "It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

It thus transpires that the defendant National Radiator Corporation and its receivers were not made parties to the appeal in this cause and are not parties to the Record in the present application for a writ of certiorari. The Circuit Court of Appeals, in its decision of March 24, 1933, consolidated all appeals and in confirming all orders and decrees of the District Court did not expressly dispose of the pending motion to dismiss the petitioners' separate appeal. It is submitted, however, that under the authorities cited above the present application is necessarily

defective, in that the appeal in the Court below, sought to be reviewed here on certiorari, was itself fatally defective.

At the expense of unduly lengthening this Brief, the respondents Reorganization Committee pray leave to conclude with a discussion of certain errors and omissions of the petitioners' application and supplementing brief, so as to make clear the facts of this case as shown by the Record.

I. There has been no departure from the accepted and usual course of legal procedure followed in cases of federal equity receivership.

Although the Reorganization Plan was promulgated February 11, 1931, receivership was not sought and receivers were not appointed until October 9, 1931 (R. 95), and then only because certain plaintiffs acting for some of the parties to this cause had instituted in New York two actions and were threatening further actions to procure preferential payment of their coupons (R. 594). The potential number of such actions was large. Were the debtor to continue to pay interest, either voluntarily or by reason of judgments obtained against it, the day was not far distant when its business would be entirely without cash working capital and would remain for the majority of creditors a body of frozen assets, with all possibility of the salvage of any substantial sum therefrom entirely lost (R. 16).

The decree appointing receivers was of the usual type, authorizing the administration of the debtor's property and enjoining levies of execution thereagainst, but not enjoining suits (R. 98).

After their appointment the receivers filed their first report, accompanied by an inventory of 235 pages, listing in minutest detail the debtor's assets (R. 122). In January

1932, at the application of solicitors for the respondents (complainants below), in accordance with the accepted practice in the United States District Courts, a day was set for the final hearing on the bill and answer, the entry of a decree of sale of the debtor's property and the taking of testimony to fix an upset price (R. 673). This hearing was set for March 3, 1932, of which due notice was given to all parties of record (R. 670). Bankers Trust Company, as Trustee, had intervened January 9 (R. 141), the First National Bank of Cincinnati intervened March 3 (R. 155), and International Heater Company intervened March 31, 1932 (R. 200). At this hearing, throughout three days voluminous testimony was taken of the appraisal and liquidating values of the debtor's property (R. 206 et seq.) and of the market prices recorded during several years for the debtor's outstanding Debentures (R. 205). The decline in market price of the debtor's Debentures from 20 to 14 in the latter part of 1930 (R. 205) was both an evidence of its financial difficulties and a forecast of the inevitable conclusion, if the losses of around $1,250,000 or $1,300,000 a year (R. 209), which resulted from the marked decline since 1928 in residential building (R. 208), should continue. Both receivers were among the witnesses and, exercising their proper function, fully informed the Court as to the nature and value of the debtor's property which was in their custody. Better testimony or of witnesses better qualified could not have been offered. The uncontroverted testimony of these witnesses showed that liquidation under prevailing economic conditions would be costly, protracted and would yield probably very little for any creditors (R. 343). Counsel for the petitioners participating in this hearing offered only his unsupported

opinion to the contrary (R. 344-357). This opinion their petition reiterates, despite the fact that it is not informed, whereas the Record contains testimony supported throughout by detailed and authentic data and the experience of experts well qualified in the radiator industry (R. 219, 220, 221; 334-339, 340, 341, 347; 381-390). But having heard all of the testimony, the District Court still took under advisement the entry of a decree of sale and only after three months of further deliberation, on May 31, 1932, entered the decree of sale and rendered the opinion subsequently made the basis of appeals to the Circuit Court of Appeals (R. 416, 420). The opinion of the Circuit Court of Appeals states:

> "We have at much labor studied and absorbed this record. A recital of the mass of facts and figures would add nothing to the decision of the case. It will be sufficient to say that, notwithstanding what on first view is a startling disparity between book values and market values, we cannot find on the evidence that the learned judge erred in naming the price in the order of sale. If the upset price of $2,500,000 reflected the fair market value of the assets, we cannot find on the assignment charging error in confirming the sale that the purchase price of $2,550,000 was inadequate. At this figure, the purchase price was two per cent. above the upset price and ten per cent. above the highest price the evidence indicated as likely to be realized in liquidation."

The sale itself was not perfunctory. It was advertised in conformity with the governing statute and widely — once a week for four successive weeks prior to such sale in eleven newspapers in as many cities (R. 545). Statements of the

receivers filed (R. 6) pursuant to Section 5[illegible] the final decree of sale (R. 464) listed the assets and liabilities of the debtor. A public sale was duly held August 8, 1932, and was reported by the receivers (R. 544).

The advertisement of the sale contained notice of the hearing on confirmation of sale to be held on August 18, 1932 (R. 472-484). At such hearing, counsel for both petitioners were present and again cross-examined witnesses throughout two days, but again offered no testimony, either of how the debtor's property could be better disposed of, than through acceptance of the Reorganization Committee's bid, or why that bid was not fair (R. 579, et seq.).

> "Upon consideration of the testimony offered at such hearing," Judge Gibson's subsequently filed Memorandum states (R. 692), "we have not been led to a change of opinion in respect to the good faith of the reorganization scheme, and the power and duty of the Court to approve it, as expressed in a prior opinion under this number, and also in opinion in the case of Lily Clapier *v.* Rudolph B. Flershem, et al., and National Radiator Corporation, at No. 2597 In Equity."

Of the purchase price of $2,550,000, $300,000 was required to be paid at once in cash (R. 699), to cover not only the receivers' obligations and expenses and allowances, but also the entire distributive dividend of "non-assenting creditors" (R. 456-458). Obviously, a substantial portion of this fund will be disbursed in payment of the distributive dividend (of about 20 cents on the dollar) to the "non-assenting creditors". The amount of administrative allowances has never been considered by the District Court.

II. The Reorganization Plan is fair and equitable.

The purpose of the Reorganization Plan was to preserve the "going value" of the debtor corporation and to liquidate, in the only practical way possible under prevailing economic conditions, the plants and other assets of the debtor corporation, for which there is no ready market (R. 53). In formulating this Plan, the Reorganization Committee sought to afford fair and equitable treatment to all classes of securityholders, without regard to any particular "interests" (R. 629). Of the Reorganization Committee, Mr. Flershem was formerly a Vice-President of American Radiator Company in charge of sales and is now Vice-President of The Marine Trust Company of Buffalo in charge of its industrial credits (R. 334), for which reasons he was asked to serve in an advisory capacity as chairman of the executive committee of the debtor corporation; Mr. Cornell is President of Cornell, Linder & Co., engineers making a specialty of assisting in corporate reorganizations (R. 624); Mr. Cahn is a member of the Baltimore banking firm bearing his name (R. 178); Mr. Waters alone has an active connection with the debtor corporation, having been president prior to 1927 of one of its constituent companies and having consented to resume the presidency in February 1930 (R. 371). In short, the Reorganization Committee had nothing whatever to do with any "representations" as to the 1927 value of the debtor's assets.

The Reorganization Plan is fundamentally a general creditors' plan, allotting to Debentureholders all of the senior securities of the New Company and approximately 78% of its common stock (R. 528). In other words, it pre-

serves the priority of the Debentureholders 100% and still gives them over three-fourths of the equity. The capitalization of the New Company (R. 56) so proposed comprises $5,358,000 of new Income Debentures presently issuable (for 50% of the principal amount of the outstanding Debentures), preferred stock without par value (issuable for the remaining 50% of the indebtedness represented by such outstanding Debentures) and common stock without par value, of which approximately 78% is issuable to Debentureholders and the remainder to the debtor's preferred stockholders, with 272,966 unissued shares reserved against the exercise of option warrants next mentioned (R. 56). To the debtor's common stockholders the Plan extends the right to obtain upon the payment of $1 these warrants, granting a right to subscribe for 1 share of new common stock in respect of each 3 shares of present holdings, at a subscription price of $20 for each share of such new common stock (R. 61). This $20 payment fixes no present valuation upon such new common stock, however, and, as all the shares of the New Company will be *without par value*, the value of its assets, as disclosed by its capital structure, is not $16,000,000, but whatever principal amount of its Income Debentures may be issued (to mature in 1946), plus such amounts as may be properly allotted to such no par value stock. The petitioners' assertion of a higher valuation for the debtor's property than the market value of the New Company's securities is scarcely defensible. It resembles their earlier insistence that the "upset price" be based upon the appraisal of replacement costs of the debtor's plants at December 31, 1926 (R. 368), of which the District Court said (R. 418):

"This appraisal is of little value in the determination of liquidation value at present, when only two of the eight plants in the combination are operating, and those two not fully. The intervening defendant has introduced no witness to contradict the witnesses of the plaintiffs who have testified as to present liquidating values. Its claim is so plainly extravagant as to make it worthy of little consideration."

The Reorganization Plan accords the $60,000 of Notes of the International Heater Company (which, by the way, were given for stock in a subsidiary (R. 587)) the same treatment provided for the outstanding unsecured Debentures (R. 66, 645). Other than such Debentures and Notes, the debtor had comparatively few obligations (R. 416), all of small amount and these, to the extent incurred for taxes, wages, services and merchandise, the Plan provided should be assumed by the New Company (R. 56). None of these claims has in fact been paid, but, to the extent that they are, will be without expense to non-participants in the Plan. Certain items of taxes and wages were preferred claims. The amount due for salaries for services is negligible (R. 689). The claims for merchandise amount to only $40,075.15 (R. 691) and were in number 396 (R. 686), all open accounts of comparatively small amounts averaging about $100 each. Under such circumstances, the Reorganization Committee considered it wise to preserve good credit relations with merchandise creditors and that it would enhance the good will of the New Company were merchandise claims paid in full. Moreover, the expense and labor of issuing new securities for so many small claims was wholly disproportionate to their total amount. The provision referred to was dictated therefore by sound business considerations

and plain common sense. Such considerations are not applicable to the claim of International Heater Company, whose position as a general creditor does not differ from that of all the Debentureholders.

The Reorganization Committee are or represent investors in the debtor's securities equal in every respect, or perhaps of superior rank (vide R. 143, 594, 650), to the petitioners' claims. To the petitioners the Plan offers the same opportunity, which has been accepted by more than 95% of the creditors, to participate in the reorganization thereby proposed. The minor equity interest accorded preferred stockholders certainly violates no principle of the *Boyd* case. This Court has often recognized the practical wisdom of continuing existing interests of securityholders, provided the relative positions of the various securities are not inequitably disturbed.

> *Louisville Trust Co.* v. *Louisville, etc., Ry. Co.* (1899), 174 U. S. 674, at 682;
>
> *Northern Pacific Ry. Co.* v. *Boyd* (1913), 228 U. S. 482, at 508;
>
> *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.* (1926), 271 U. S. 445, at 453.

As there has been no agreement between any class of senior securityholders and stockholders to preserve the rights of both at the expense of unsecured creditors, the "collusion" complained of in the *Louisville Trust Company* case is not present. In the instant case, the Reorganization Plan has been carefully and equitably designed, as Mr. Justice Brewer counselled, so as not to "recognize and preserve any interest in the stockholders without also recog-

nizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation".

Louisville Trust Co. v. *Louisville, etc., Ry. Co.* (1899), 174 U. S. 674, at 683.

In the instant case the Circuit Court of Appeals has stated its opinion,

> "which is in complete accord with the findings of the learned trial judge, that while the evidence shows consultation and co-operation between these several parties in formulating the plan it does not disclose collusion or fraud."

III: The District Court had jurisdiction to execute the decree of sale and to confirm the sale had thereunder.

From the decree of sale the petitioners appealed July 23, 1932 (R. 490). The sale was held August 8 (R: 550), was reported by the receivers to the District Court, where it was again vigorously attacked by the petitioners at the hearing of August 18 (R. 579) and was confirmed September 8, 1932 (R. 692). From this confirmatory decree an appeal was taken September 30, 1932 (R. 712).

On September 13, the petitioners moved the District Court for a stay of execution of the two decrees (R. 710), and made like motion in the Circuit Court of Appeals on September 15, 1932. Both motions were denied, on failure of the petitioners to furnish a supersedeas bond. *But jurisdiction by the District Court over the debtor's property had been retained by the District Court* by Section 19 of the confirmatory decree (R. 701) and the subject-matter of this litigation remains intact. Under such circumstances, the

pendency of the petitioners' appeal from the decree of sale, in the absence of the supersedeas bond, which they refused to furnish, did not preclude the confirmation of the sale.

Lesamis v. *Greenberg* (C. C. A. 9th Cir., 1915), 225 Fed. 449.

In that case, at page 453 of the Reporter, it was said:

> "The Revised Statutes of the United States (Section 1001) provide for supersedeas, and the manner in which it may be obtained. Otherwise the courts will not ordinarily stay execution or postpone sales pending hearing on appeal."

In the cases cited below, United States Courts also proceeded with a sale and confirmation thereof, notwithstanding the pendency of appeals.

Hovey v. *McDonald* (1883), 109 U. S. 150.

Davis v. *Mercantile Trust Co.* (1894), 152 U. S. 590.

Duncan v. *Atlantic M. & O. Ry. Co.* (E. D. Va., 1880), 88 Fed. 840.

Gay v. *Hudson River Electric Power Co.* (N. D. N. Y., 1911), 190 Fed. 812.

Lesamis v. *Greenberg* (C. C. A. 9th Cir., 1915), 225 Fed. 449.

The Midland Terminal Ry. Co. case referred to by the petitioners was one where *the supersedeas bond had been tendered and approved and filed.* In the absence of some such restraint, there has obviously been not even that "technical contempt" implied by the petitioners' citation of the *Merrimack River Savings Bank* case.

The Circuit Court of Appeals (after full examination of the Record), in its opinion of March 24, 1933, to each of the questions proposed by the petitioners answered "no" and thereupon affirmed in all respects all orders and decrees of the District Court. This opinion, sustaining in every respect the findings of fact and adjudications of the District Court, discloses no substantial error in the instant case and the respondents respectfully submit that this opinion and the Record show a correct and equitable application of the principles well settled by previous decisions of this Court.

CONCLUSION.

The petition for a writ of certiorari should be dismissed with costs.

Respectfully submitted,

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,

Counsel for Respondents RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

Nos. 162 - 163

MAY 25 1933

CHARLES ELMORE CROP
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

No.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,
Petitioners (Appellants Below),

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of NATIONAL RADIATOR CORPORATION and BANKERS TRUST COMPANY, Trustee, NATIONAL RADIATOR CORPORATION (Delaware), NATIONAL RADIATOR CORPORATION (Maryland), ROBERT S. WATERS and WILLIAM G. HEINER, Receivers, CARL E. RESLEY and G. FRANKLIN LUDINGTON,
Respondents (Appellees Below).

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY AS TRUSTEE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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as Trustee.

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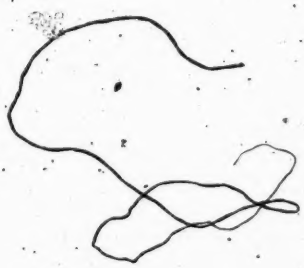

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. _____

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,
Petitioners (Appellants Below),

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of NATIONAL RADIATOR CORPORATION and BANKERS TRUST COMPANY, Trustee, NATIONAL RADIATOR CORPORATION (Delaware), NATIONAL RADIATOR CORPORATION (Maryland), ROBERT S. WATERS and WILLIAM G. HEINER, Receivers, CARL E. RESLEY and G. FRANKLIN LUDINGTON,
Respondents (Appellees Below).

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY AS TRUSTEE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

This is a companion petition to No. 964, to which this Respondent has already filed an answering brief.

The brief filed by the Reorganization Committee in opposition to this petition deals in detail with the various contentions raised thereby as to the fairness of the Plan of Reorganization. Fundamentally, it seems to this Respondent that the issue raised by this petition is *merely* whether or not, in all the circumstances, the properties and assets of National Radiator Corporation should, upon the application of this Trustee, acting under instructions from 96% of the holders of the debentures whom it represented, have been sold, and permitted to be purchased pursuant to a Plan of Reorganization. Petitioners apparently maintain that the procedure followed in the District Court was such a radical departure from the usual course as to merit review by this Court. In the opinion of this Respondent, which of necessity closely followed the proceedings both in the District Court and in the Circuit Court of Appeals, these proceedings were conducted along the ordinary and usual lines, a full and fair opportunity being afforded to all creditors and other parties interested to present their views to the Court.

We think that a brief statement of the various steps in the District Court proceedings will of itself convince this Court that such was the case. This Respondent, as Trustee, applied for and obtained a judgment for the amount of the outstanding debentures. It then applied for a decree of sale; long hearings were held preliminary to the entry of that decree, at which detailed evidence was adduced with respect to the value of the properties; full opportunity was given to Petitioners to cross examine Complainants' witnesses and to produce witnesses of their own. Based upon the evidence so adduced which was, we think, ample to ground the finding, the Court included in its decree of sale an upset price. The property was purchased for $50,000 more than the upset price. After the sale, a hearing was held upon the question of confirmation, at which time again Petitioners had every opportunity to present to the Court their views as to the

fairness of the Plan, and evidence in support of its fairness was taken. The District Court determined that the Plan was fair and therefore confirmed the sale. The Circuit Court of Appeals has affirmed that determination.

The petition should be denied.

Respectfully submitted,

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Counsel for Bankers Trust Company,
as Trustee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.,

Respondents.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.,

Respondents.

BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONER FIRST NATIONAL BANK OF CINCINNATI.

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for Respondents Reorganization Committee.

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BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONER FIRST NATIONAL BANK OF CINCINNATI.

Opinions of the Courts Below

The opinion of the District Court filed simultaneously with the entry of the final decree of sale is printed at pages 280-283 of the printed Transcript of Record. The opinion of the District Court filed in connection with the decree confirming sale is printed at page 463 of the Record. Neither of these opinions has been published. The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 64 Federal Reporter (2d

Series) at page 847, *et seq.*, and appears in the printed Transcript of Record at pages 534-544.

Jurisdiction

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., § 347a).

Statement of the Case

Respondents do not consider it necessary to include in this brief any statement of the case beyond the following corrections of inaccuracies and omissions in the statement of the case as set forth in the brief of the petitioner, First National Bank of Cincinnati (*figures in italics referring to pages of said petitioner's brief*).

This suit did not result in a "perfunctory judicial sale in a manner studiously designed to effectuate a transfer of all of the assets of the Corporation to the nominee of the Reorganization Committee" (*3, 6*). The decree in its general provisions awards the final relief customarily granted under a creditors' bill (R. 283), but the District Court did not perfunctorily adopt the draft decree which was submitted by the complainants. The decree which was finally signed embodied numerous changes required by the District Court, and was entered only after three days of testimony (R. 133-269), a full day of legal argument, and approximately two and a half months of further consideration by the District Court (R. 283). The decree required notice of the time and place of sale and of the property to be sold to be published once a week for four successive weeks in newspapers in the cities of New York, Buffalo, Boston, Baltimore, Washington, Richmond, Trenton, Pittsburgh, Johnstown, Cincinnati and Chicago (R. 298) and directed the

property to be offered in parcels and then as an entirety (R. 300, 301) at public auction at the court house at New Castle, Lawrence County, Pennsylvania (R. 298). All who might be interested had every means of notice and every opportunity to bid.

The persons who made representations as to the value of the Corporation's assets in 1927 were not "the same interests as those sponsoring the reorganization" (*3, 10, 34, 47*). The Corporation and its bankers were the persons who made the representations in 1927 (R. 275), whereas two of the three individuals who formulated the Plan of Reorganization had nothing to do with the Corporation or its financing and were not connected with the Corporation until long after its organization and the issuance of its securities (R. 117, 225, 250).

The Plan of Reorganization of February 11, 1931, as will appear from an examination thereof, can not be called a plan "for the benefit of debentureholders and preferred and common stockholders" (*4*). On the contrary, it was a plan **primarily and predominantly for the benefit of the Debentureholders.** The preferred and common stockholders were wiped out, except for the very small interest in the equity given to the preferred stockholders and the option given to the common stockholders to acquire a minority interest in the equity by putting up a substantial amount of new money (R. 40, 41).

The decree appointing the Receivers did not enjoin suits (*5*), but only attachments and interferences with the property in the possession of the Receivers (R. 66).

William G. Heiner, one of the Receivers, was an attorney of Pittsburgh, who had had no relation whatsoever to the situation prior to his appointment by the District Court. After his appointment, he spent about three days a week

in the plant and offices of the Corporation, and devoted a large amount of time to a study of the Corporation's affairs (R. 256).

The statement is overstrong that "the business as an entirety was a demonstrated failure" (5). While it is true that the Corporation had an operating loss (after depreciation and Debenture interest) of over $4,000,000 during the three years preceding 1931 (R. 33), those years were all in a period when building construction, on which the Corporation principally depended for its business, was steadily diminishing (R. 190), and more than two of these three years were included in the great economic depression. Moreover, of this $4,000,000 only $1,818,036 represents loss from actual operations, the remainder being interest on the Debentures. It has not been "demonstrated" that the Corporation cannot be operated profitably under normal conditions.

When the Receivers were appointed, the Corporation had $1,257,381.59 in cash (6) (R. 521). If, however, it had paid its February and August 1931 coupons and had complied with sinking fund requirements, totaling $1,094,429.50, and had paid the $157,511.89 of other debt then unpaid (R. 248), the amount of cash left would have been about $5,500, and would have left nothing with which to satisfy the principal of the Debentures except buildings, machinery, inventory, accounts receivable and other assets which would not have been susceptible of liquidation at all or for but a small fraction of such indebtedness.

It is not true that "the respondents, without notice to the creditors, submitted to the District Court the final decree of sale" (6). Notice was given to all parties to the cause (R. 449, 450). The Trustee under the Indenture was one of the parties, in effect representing all Debenture-

holders, and was given notice. In particular, notice was given to counsel for the petitioner First National Bank of Cincinnati, although that institution was not at the time a party, and that institution as an intervener was present by counsel throughout the hearing extending from March 3rd to March 7th, 1932 inclusive, and again at the argument on March 14, 1932 and participated in the proceedings; and the decree thereafter entered was not made until May 31, 1932, after more than ten weeks' further consideration by the District Court.

It is true that the same counsel acted for the Reorganization Committee and for the Receivers (*6*). Such counsel acted for the Receivers, however, by formal appointment of the District Court, made on the Receivers' petition (R. 1). We submit that there was no impropriety in this, since the creditors were all of one class, to-wit, general creditors, and when their creditors' bill was filed the complainants Reorganization Committee were even then acting for the holders of over 90% of the Debentures, which represented most of the Company's indebtedness (R. 8-9).

It is true that plants and machinery were listed in the Receivers' inventory at $6,743,419.15, (*7*), but this figure was the Corporation's book value and was based on replacement costs of these properties as computed by Sanderson & Porter in an engineering appraisal as of December 31, 1926 (R. 248).

The petitioner refers to "an apartment house" as one of the assets embraced in the sale (*6*). The Record shows that this property, which was appraised at $133,000, was in foreclosure, subject to approximately $208,000 of mortgage debt, interest, taxes and other liens (R. 330), and that the Corporation had only a worthless equity of redemption left. The petitioner refers to the stock of National Steel Boiler

Company as an additional asset (*7*). The uncontradicted testimony was that this stock had no value whatever (R. 265, 266).

The petitioner assumes (*7*) that, prior to the entry of the final decree of May 31, 1932, there was some infallible test whereby the District Court could have assured itself that the sale conducted under such decree and at the upset price therein specified, would yield as much as would the procedure by piecemeal sale and liquidation suggested by the petitioner. As to this assumption, the least that can be said is, that the testimony made it perfectly obvious that the so-called liquidation suggested by petitioner was a precarious undertaking and that there was no means by appraisal or otherwise of receiving any assurance as to the results of such a process. The difficulties of successful liquidation are clearly and convincingly presented in Mr. Flershem's testimony (R. 226, 228, 230-240).

It is not true that the District Court "did not secure an appraisal and acted only upon the so-called opinion of the purchasers" (*8, 33*). It had before it an inventory of 235 pages, at book figures, of every asset the Corporation possessed. That inventory is on file as an original exhibit in the office of the Clerk of this Court. The District Court devoted about three days to taking testimony as to the value of these assets and the estimated net amount in cash which could be realized by a sale or liquidation of each. Two of the witnesses owned no interest in the Corporation, two were the Receivers themselves and only one of the witnesses as to value was a member of the Reorganization Committee. The District Court was also informed as to the market price of the Debentures on The New York Stock Exchange, not merely during the receivership (*35*), but for a period of a year or more preceding the receiver-

ship (R. 136). In short, the District Court itself made a very full appraisal.

The statement is not correct that the Plan provided that "the rights of the Debentureholders as creditors should as such be cut in half" (9). Under the Plan, practically the entire ownership and voting control of the New Company will belong to the Debentureholders (and other general creditors). So far as concerns the treatment of preferred stockholders under the Plan, their so-called "substantial share in the assets of the corporation" (9) will consist at the most of an aggregate of 22% of the common stock of the New Company (R. 358). The common stockholders of the Corporation, in addition to paying $1 for a warrant, must, upon exercise of such warrant, **pay $20 per share** for the new common stock. If and whenever the new common stock is worth $20 per share, the new securities which are given to Debentureholders will have a value of $1,400 for each $1,000 of the present Debentures.

It is true that under the Reorganization Plan the New Company assumes the obligations of the old Corporation owing to certain merchandise and service creditors (9). **Those creditors, however, are not preferred in any funds of the receivership estate,** and the amount of the indebtedness thus assumed was only $40,075.15 (R. 459, 462), comprising 396 claims averaging about $100 each, out of a total indebtedness of upwards of $12,000,000. The Plan does not contemplate, as the petitioner's brief states at page 48, "the payment of all the creditors, excepting only the Debentureholders and the International Heater Company, in full in cash," (R. 37) and it does not appear from the proceedings below "that this had been done" (R. 430-431) and, in fact, they have not been paid.

It is not correct that the fund of $300,000 paid in cash on

account of the purchase price was reserved for administration allowances (*10, 38*). It is in substantial part to be applied as the distributive dividend against $400,000 or more of claims of creditors (including petitioner) not participating in the reorganization (R. 307 and 310).

The capital structure of the New Company will not be $16,000,000 or anything like that amount (*10*), but only the $5,358,000 of Income Debentures plus whatever amount may be properly allocated to the **no par value** stock of the New Company (R. 37). Apparently the petitioner's computation assumes a wholly unwarranted capitalization of $115 per share for the **no par value** preferred stock and $20 per share for the **no par value** common stock of the New Company (R. 39, 40).

The petitioner's brief inquires at page 10 what there is "in the judicial touch which renders assets comparatively valueless when constituting a trust in the Court's hands, although of great value at every other moment". A partial though exaggerated answer is given at page 5 of the same brief, where the petitioner asserts that "the business as an entirety was a demonstrated failure". The fact is that the securities of the Corporation were issued in 1927 and that the values of the plants were replacement costs **as of December 31, 1926.** The District Court was considering the sales value of these properties **in 1932,** and in any event, if there is anything in the petitioner's contention that the business was a demonstrated failure, it is difficult to see how petitioner can consistently argue the feasibility of selling for any substantial sums, property which could not produce earnings.

It is not true that the result of the decree of sale is to continue the business in the hands of the same management under whose charge it was a demonstrated failure (*11*).

The Record clearly shows that the management of the New Company (Mr. John H. Waters) did not take active charge of the business of the old Corporation until February 1930 (R. 249, 250, 453), and surely no business losses subsequent to that date, when the economic depression had overwhelmed practically every industry in the country, can be considered as a reflection upon the present management or as a demonstration of the business's failure.

SUMMARY OF ARGUMENT

I.

Under the circumstances in which the Corporation found itself, insolvency was inevitable and its reorganization was desirable in the interest of creditors.

II.

The District Court was fully advised of the character and value of the Corporation's property and fixed an adequate upset price in a fair manner and after hearing all parties who wished to be heard, and the District Court did not err in confirming the sale at a price in excess of this upset price.

III.

No creditor had a right to piecemeal liquidation.

IV.

The Plan of Reorganization was fair and was not in contravention of any principle of law or equity.

V.

The District Court had power to enter the confirmatory decree of September 8, 1932.

ARGUMENT

I.

Under the circumstances in which the Corporation found itself, insolvency was inevitable and its reorganization was desirable in the interest of creditors.

National Radiator Corporation resulted from the merger of the properties of six independent companies engaged in the radiator industry (R. 137). The constituent companies had earned satisfactory profits (R. 278), and when the Corporation began business late in 1927, its prospects appeared to be bright (R. 275). Very shortly after the Corporation began operations, however, it encountered unfavorable business conditions (R. 138, 190). Its volume of sales was largely dependent on the amount of new building construction (rather than the then current activity of the stock market) and especially residential building, and as early as 1928 building construction began to decline (R. 138 and 190) and has continued to decline ever since. The year 1929 was not a good year in the radiator industry. In 1929 residential building construction declined about 30% below 1928; between 1928 and 1930 new construction of residential buildings declined approximately 60%; and by 1931 the reduction below the peak of 1928 was approximately 66% (R. 138, 190). As a result, from 1928 to the end of 1930, the Corporation lost over $4,000,000 (R. 139).

At the beginning of 1931, the directors considered the situation and decided that the affairs of the Corporation had reached a critical stage. Debenture interest was due

on February 1 and again on August 1. During the year sinking fund payments also were required to be made. The total of interest and sinking fund payments for that year would be $1,094,429.50. The Corporation had sufficient cash to pay these charges as they fell due. If, however, it used its cash for that purpose, it would have seriously impaired its necessary cash reserves. Moreover, having parted with all its cash to pay interest, it would have available to pay principal on over $10,000,000 of outstanding Debentures, only idle plants and machinery, which perhaps could not be converted into cash at all because of the depression, and accounts receivable, inventory and other assets, which could not be liquidated and converted into cash except at great loss. It seemed to the directors that if interest and sinking fund requirements should continue to be met in 1931 there must be certain insolvency, a default in interest, and acceleration and default in principal in 1932, and creditors would receive only a small dividend on the principal of their claims. It was obvious that there was no hope that the Corporation itself, that is its stockholders, could ride out the depression. Sooner or later, the Corporation must surrender unconditionally to its creditors. The question then arose as to the condition the Corporation would be in at the time of such surrender. The Corporation might continue to pay interest as long as the cash lasted and then surrender to its creditors merely an aggregation of idle plants and machinery deprived of all working capital; or interest payments might be stopped immediately, so that the enterprise might be surrendered to the creditors in the form of a going concern.

In that situation the directors decided as a matter of sound business judgment, that the best interests of all

securityholders would be served if interest payments were discontinued, so that the working capital might be conserved (R. 501). The fact is, and is plainly stated in the Reorganization Plan, that National Radiator Corporation omitted the payment of interest on its Debentures because its management was firmly convinced that the liquidation of the Corporation would prove disastrous to creditors and that its cash must be conserved, if the enterprise were to be continued as a going concern. Of course, the directors' decision to omit payment of Debenture interest as a means of continuing the business entailed the decision that the capital structure should be reorganized, but it is not true, as petitioner has suggested, that the interest payment was omitted to bring about reorganization. Reorganization was not an end in itself. It was resorted to only as a means of salvaging the maximum value of the assets of the Corporation for its creditors. If National Radiator Corporation had not discontinued payment of debenture interest, by this time, it would have entirely exhausted its cash resources. Certainly a debtor does not merit the accusation of bad faith, if, before becoming wholly penniless, it seeks to conserve its cash resources for the benefit of its creditors. Accordingly, the creditors were advised of the conditions existing and a Plan and Agreement of Reorganization was formulated by the Reorganization Committee. The course adopted by the management has had the approval of the holders of the overwhelming majority of the Debentures, which constitute most of the Corporation's indebtedness. By October 1, 1931, the holders of over 90% of the outstanding Debentures had signified their adherence to the Plan and had deposited their Debentures with the Reorganization Committee (R. 365).

In the meantime, certain Debentureholders had instituted actions at law upon their overdue interest coupons and others were threatened (R. 399). If these were allowed to succeed, the result would be a dissipation and waste of the Corporation's assets through execution sales of its properties piecemeal, with probably full payment to a few more diligent creditors and only a small dividend to those less diligent (R. 11).

Acting in the interest of the holders of over 90% of the Debentures, the Reorganization Committee, on October 5, 1931, filed a typical general creditors' bill, praying for a judicial sale of the Corporation's properties, and the appointment of Receivers (R. 6-14). This creditors' bill in its essence was in no wise different from any other suit brought by a creditor against his debtor to secure satisfaction by sale of his debtor's assets and, if necessary, himself to buy in the debtor's property at judicial sale.

Brown v. *Lake Superior Iron Co.* (1890), 134 U. S. 530;

American Mine Equipment Co. v. *Illinois Coal Corp.* (C. C. A., 7th Cir., 1929), 31 Fed. (2d) 507.

It is a "form exceedingly familiar", said District Judge Learned Hand in his opinion defining the evolution and propriety of a similar creditors' bill in

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265.

The point is made that in the instant case, however, the suit was filed to aid in consummating the Plan of Reorganization. But the Plan of Reorganization, in its essence, is nothing more than an agreement among the creditors as to

what they propose to do, in case they become the purchasers of their debtor's property at judicial sale. The propriety of such a suit by a creditor or group of creditors certainly cannot be affected by the fact that they know and disclose, before they file their suit, what they intend to do with their debtor's property, if they should purchase it.

> *Conley* v. *International Pump Co.* (S. D. N. Y., 1915), 237 Fed. 286.

There is in the instant case not a single element which bears analogy to the abuses which were criticized by this Court in the case of *Shapiro* v. *Wilgus* (1932), 287 U. S. 348. In the *Shapiro* case, the receivership was a device, effectuated with the aid of one friendly creditor, by which the debtor hoped to hold his creditors at bay for an indefinite period until the debtor should be able, by gradual liquidation, to take care of his debts and save a surplus of $100,000 for himself. In the instant case, the overwhelming majority of the creditors instituted this suit for equitable execution against the property of their debtor, and their debtor interposed no obstacle or delay to their having prompt execution upon its property in satisfaction of their debt. A sale for the benefit of all creditors has actually been decreed and held **and all interest of the debtor in its property has been wiped out.**

It is the petitioners (in this and companion cases), constituting less than 2% of all the creditors, who object to the vigor with which the complaining creditors have pressed their remedies; and it is the wish of this small minority to hold more than 96% of the creditors at bay.

What has been done in the instant case comes wholly within the following approving language of the opinion of this Court in the *Shapiro* case:

"It is one thing for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380. Whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary."

II.

The District Court was fully advised of the character and value of the Corporation's property and fixed an adequate upset price in a fair manner and after hearing all parties who wished to be heard, and the District Court did not err in confirming the sale at a price in excess of this upset price.

The Receivers were appointed October 9, 1931, and were directed to operate the business (R. 64-68). On January 2, 1932, two months prior to the final hearing, they filed their First Report (R. 82). This advised the Court of the results of their operations to November 30, 1931 (R. 85). Appended to their Report and by reference made a part of it, was an inventory of 235 pages showing in minute detail the assets of the Corporation and the values at which they were carried on the books. The First Report, including this inventory, is on file with the Clerk of this Court as an original exhibit.

The case came on for hearing, on the prayer for a judicial sale, on March 3, 1932. The Receivers' First Report,

including their inventory, was then on file with the Court. The Court, to inform itself as to the value of the Corporation's assets, as well as the merits of the case, took testimony for three days (R. 133 to 269), and heard arguments of counsel for the better part of another day.

The first witness before the Court was a specialist on values of securities. He testified that the Debentures of the Corporation had been listed on the New York Stock Exchange since their issuance in 1927, that their market price was around 20 about the middle of 1930, dropped in the latter part of the year to a low of 14, and that the highest price for that year was 25 (R. 134-136). He testified further that in 1931 the Debentures had a low of 11 and a high of 25⅞ (R. 136). It will be observed that these were prices prevailing at a considerable period prior to the receivership, which had not occurred until October 9, 1931. The witness also testified that in 1932, which would include the period of the receivership, the high was 14 and the low was 8 (R. 136). As the aggregate amount of the Debentures outstanding during the period prior to the receivership was about $10,700,000, the value placed by the investing public upon the entire assets of the Corporation, in the public market place, prior to the receivership, ranged from about $1,177,000 up to $2,675,000. The market prices prevailing after the receivership indicate an even lower valuation.

The Court also heard the testimony of its Receivers. One of them, Mr. Waters, described the Corporation's plants, assets and property in great detail (R. 139-142) and explained the difficulties of a piecemeal liquidation thereof over an extended period of time (R. 146). He testified that all the plants were essentially useful only for the production of cast iron boilers and radiators, and he stated

that the machinery could not be devoted to any other use and that the buildings themselves could be utilized only for jobbing foundry work and that even this would involve the installation of new machinery (R. 142-143). He expressed the opinion, giving his reasons therefor, that such a liquidation would produce about $2,195,000 in cash (R. 154). Mr. Heiner, the other Receiver, who had no connection with the Corporation prior to the receivership, expressed the opinion that the liquidating value of the assets was approximately $2,230,000 (R. 257).

Mr. John H. Waters, President of the Corporation, stated that he and his family held over $1,500,000 of the Debentures (R. 252). He explained the difficulties of a piecemeal liquidation (R. 251). His views on this subject should have been of great value because of his long experience in the radiator business, which had begun in 1893 and continued with only a comparatively brief interruption (1927 to 1930) to the date of the receivership (R. 249-250).

Another witness was Mr. R. B. Flershem. He is Vice-President of the Marine Trust Company of Buffalo, New York, and previously had been employed for 25 years by the American Radiator Company in capacities ranging from "cub salesman" to vice-president in charge of sales (R. 224). The American Radiator Company is the largest in the industry, and in the last year of Mr. Flershem's connection with it had sold nearly half of all boilers and radiators sold in the United States in that year (R. 225). He did not own and never had owned any interest in the Corporation (R. 231). Mr. Flershem was a member of the bankers committees for Pierce, Butler & Pierce, large manufacturers of boilers and radiators, and Richardson & Boynton, a boiler manufacturer and jobber of radiators. It

would have been impossible to find anyone in this country better qualified to express an opinion as to the feasibility of liquidating the inventory of a radiator company which had ceased to do business. He expressed the opinion, with full explanation of the facts on which it was based, that the amount reasonably to be expected to be received on liquidation, in view of existing economic conditions, the expense of liquidation and other relevant factors, was $2,300,000 (R. 230). He pointed out that as soon as a policy of liquidation was inaugurated, the entire stock would be considered obsolete by the trade and would have to be sold at ruinous prices (R. 227-235), and he cited his own experiences with American Radiator Company to show the sacrifice and expense entailed in disposing of obsolete products. He pointed out the difficulties involved in the collection of accounts in the case of liquidation (R. 234).

The petitioner states, on page 8 of its brief, that the Court acted on the opinion of "the purchasers who wanted to buy the property as cheaply as they could". In point of fact, the Record shows that only one member of the Reorganization Committee, Mr. Flershem, was a witness as to the value of the property and he did not own any interest in the Corporation. Though the petitioner is very critical of the witnesses produced by the Respondents at the hearing, it has not suggested any others who would have been able to give more accurate information or better assistance to the Court. The Court was ready to hear any other witnesses whom any interested party might have produced, but neither the petitioner nor anyone else produced additional witnesses. Under the circumstances, it was entirely proper for the Respondents to have offered testimony in respect of the upset price.

Palmer v. *Bankers Trust Co.* (C. C. A., 8th Cir., 1926), 12 Fed. (2d) 747, 754;
Equitable Trust Co. v. *Western Pacific Ry. Co.* (N. D. Cal., 2nd Div., 1916), 233 Fed. 335.

The petitioner contents itself with arguing strenuously that, because these witnesses may have had an interest or a predeliction in favor of reorganization, the Court must indulge in the conclusive presumption that the witnesses offered by the Respondents were disingenuous and that their testimony is worthless, that the true facts are entirely at variance with what these witnesses said and that the Court should have disregarded the testimony and should have accepted the petitioner's "*ex parte* assertions unsupported by testimony" as to the feasibility of liquidation and the value of the property.

The highest figure expressed by any witness as his opinion of the liquidating value of the assets of the Corporation was $2,300,000. The Court fixed the upset price at $2,500,000. The price actually bid was $2,550,000.

After the judicial sale which was held on August 8, 1932, and of which notice was duly published once a week for four successive weeks in newspapers of the cities of New York, Buffalo, Boston, Baltimore, Washington, Richmond, Trenton, Pittsburgh, Johnstown, Cincinnati and Chicago, the case again came on for hearing on confirmation of the sale and for consideration of the fairness of the Plan of Reorganization. The notice of sale itself, which had been published widely, in 12 newspapers in 11 cities, from the date of its first appearance gave more than 6 weeks' notice of the time and place of the hearing on confirmation set for the 18th of August, 1932 (R. 368). On the 12th of August, 1932, 6 days before this hearing, a

further notice of its time and place was published in the same newspapers in which notice of the sale previously had been published (R. 465), so that there can be no question but that all concerned had full opportunity to prepare for the hearing and to produce witnesses to show that the bid price was inadequate, if that were in truth the fact. Counsel for the petitioner First National Bank of Cincinnati again was present, but this time he again failed to produce any testimony as to the value of the property.

In fact, not once during the entire proceedings before the District Court, did petitioner state to the Court what petitioner considered a fair upset price. The only figure which petitioner ever suggested was the sum of $11,000,000 and this was characterized by the District Court as "so plainly extravagant as to make it worthy of little consideration". Now petitioner demands that this Court secure to the petitioner "the amount of the principal of the petitioner's indebtedness with interest, costs and disbursements, including counsel fees". In rejecting a similar demand, Judge SANBORN, of the Circuit Court of Appeals for the Eighth Circuit, said:

> "To sustain the contention of his counsel would result in his receiving the whole amount of his claim against the insolvent company and interest upon it in cash, while other creditors in his rank received only their just shares of the property in the stock of the reorganized company."
>
> *Phipps* v. *Chicago, R. I. & P. Ry. Co.* (C. C. A. 8th Cir., 1922), 284 Fed. 945.

Counsel for all the other petitioners were also present at the hearing on confirmation. Counsel for International Heater Company complained that he had not had notice

of the hearing on upset price and therefore had had no opportunity at that time to offer evidence on the value of the property. However, like all others interested, he did have ample notice of the time and place of the hearing on confirmation of the sale and thus had, on the proper occasion, the opportunity which he claims was previously denied him. Although he was actually present at the hearing on confirmation, he introduced no evidence whatever that the bid was inadequate. From this fact, the inference would seem to be that the purchase price was both adequate and fair.

Although the question of value in this case had been thoroughly considered by the Court at the hearing on upset price, the proper time and place for consideration of the adequacy of the bid was at the hearing upon confirmation of sale.

> *Guaranty Trust Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.* (N. D. Ill., E. D., 1925, 1926), 15 Fed. (2d) 434, 442.

In fact, a decree of sale without any upset price would have been proper, with the entire question of the adequacy of the purchase price left for determination at the hearing on confirmation of sale.

> *Provident Life & Trust Co.* v. *Camden & T. Ry. Co.* (C. C. A., 3rd Cir., 1910), 177 Fed. 854.

And at this point it is most pertinent to emphasize that, whereas all the contentions of petitioner as to upset price which were urged before the District Court at the hearings in March 1932, were based upon the financial condition of the Corporation as of December 31, 1931, the real question now involved in this case is not whether the upset price

was a proper bid for the properties as existing on December 31, 1931. The real question is whether the District Court erred in confirming the bid at the sale held on August 8, 1932, upon the basis of the assets as then constituted. The adequacy of this bid is of course to be determined by the condition of the property *at the time of sale.*

> *Guaranty Trust Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.* (N. D. Ill., E. D., 1925, 1926), 15 Fed. (2d) 434.

The evidence shows that there had been substantial changes in the condition of the Corporation between December 31, 1931, and the date of the sale. The financial condition of the Corporation as of June 30, 1932 (five weeks before the sale) is shown by the "Statement of the Receivers" filed with the District Court pursuant to Section 54 of the Decree of May 31, 1932. This statement is on file as an original exhibit with the Clerk of this Court. The following table shows the changes in current assets which had taken place between December 31, 1931, and June 30, 1932:

	December 31, 1931	*June 30, 1932*
Cash and equivalent	$1,830,000.	$1,570,000.
Inventory	1,634,905.	1,671,605.
Notes and Accounts receivable	858,000.	641,000.

The procedure in the District Court was orderly, formal and deliberate. The decree of sale and the upset price were based upon testimony of witnesses taken in open court and subjected to cross-examination by petitioner's counsel; and all objections by dissenting creditors were presented to the District Court by extended oral arguments and voluminous briefs and were fully considered by the Court. The hearings upon upset price were unusually thorough and extended and the Court itself acted as an independent and

impartial appraiser. With due regard to the principles laid down in the cases cited below, every effort was made by the Respondents to bring to the consideration of the Court not only the public's estimation of the Corporation's worth, as shown by the prices at which its Debentures had been selling, but also its present earnings and book values.

Central Trust Co. v. *Washington County R. Co.* (D. Me., 1903), 124 Fed. 813;

Equitable Trust Co. v. *Western Pacific Ry. Co.* (N. D. Calif., 2nd Div., 1916), 233 Fed. 335;

Fearon v. *Bankers Trust Co.* (C. C. A., 3rd Cir., 1916), 238 Fed. 83;

Simon v. *New Orleans, T. & M. R. Co.* (C. C. A., 5th Cir., 1917), 242 Fed. 62.

It is obvious, as this Court has had occasion recently to point out, that many factors are to be considered in the orderly and intelligent settlement of a decree of sale. But it is equally obvious, from a study of the cases and many unreported decrees, that there can be no hard and fast rule of what under the circumstances of the particular case will furnish adequate data. It is submitted, however, that in the instant case the District Court was furnished with all relevant and adequate data essential to the formulation of a fair and proper decree of sale. With particular regard to this aspect of this case, the opinion of the Circuit Court of Appeals states (R. 537):

> "We have at much labor studied and absorbed this record. A recital of the mass of facts and figures would add nothing to the decision of the case. It will be sufficient to say that, notwithstanding what on first view is a startling disparity between book values and market values we cannot find on the evidence that the learned Judge erred in naming the price in the order of sale."

Radiator and boiler plants are not saleable like ordinary chattels or real estate. There are only two sorts of persons who have any interest in purchasing such plants: one is a person with money who might wish to engage in the radiator or boiler business and the other is a person already engaged in such business who might wish additional plant capacity. The present excess of plant capacity in the country is a matter of common knowledge and judicial notice and if there were any persons interested in putting new money into the radiator or boiler business, they were afforded every opportunity to appear at the judicial sale and bid for any one or more of these plants.

No amount of testimony or appraisals by "independent experts" or any other specialist could have produced anything more than mere opinion as to what the properties could have been sold for through a process of deferred and piecemeal liquidation. Engineering appraisals based on reproduction cost new, less depreciation, are of course utterly worthless in determining what industrial properties, particularly idle plants, can be sold for; **and no appraisal can produce a buyer.**

The determination of the upset price and the confirmation of the sale by the District Court **was a determination of a pure question of fact** and presents no question of law for review by this Court.

Graffam v. *Burgess* (1886), 117 U. S. 180;
Charleston Mining Co. v. *United States* (1927), 273 U. S. 220.

III.

No creditor had a right to piecemeal liquidation.

Under Point I of its brief, the petitioner contends that it had an absolute right, and that there rested an absolute duty upon the District Court, to order a piecemeal liquidation, to be carried out over an indefinite period of time, if so many as *one* dissenting creditor should be of the opinion that this was the best way to proceed.

Petitioner refers in its brief to a so-called "normal liquidation". We submit that there is no such thing as "normal liquidation" in equity. The late Circuit Judge JULIUS M. MAYER, in an address before the Association of the Bar of the City of New York, published in "Lectures on Legal Topics", Vol. VI (New York: Macmillan & Co., 1929), p. 165, said:

> "The equity receivership is the physician who desires to cure the patient. . . . The underlying thought, the compelling motive of equity receivership is to save the business."

As a matter of fact, with the growth of extensive and highly organized enterprises, only through a sale of the debtor's property as an entirety can its essential value be preserved. The normal outcome of an equity receivership is reorganization. Liquidation is the rare exception. If liquidation were to be the normal outcome of all the equity receiverships which are now in process of administration in this country, if all these huge industrial enterprises were to be wound up, the destruction of capital values would be a national calamity. Even corporations in receivership have an economic and social value.

We concede that a court of equity having custody of the property of a corporation possesses discretion to discontinue the conduct of the business and to adopt a program of piecemeal liquidation. This course of procedure, however, involves a determination of a question of fact and would not have been justified in this case, unless the Court had had convincing evidence that such a course would have produced a larger net amount than would have been produced by the customary judicial sale to the highest bidder. In the instant case, the uncontradicted testimony was that piecemeal liquidation would produce less net proceeds than the price actually realized by the public sale. Unless the Court below was disposed, therefore, at the mere suggestion of counsel for petitioner, to incur the risk of overwhelming losses for more than 96% of the creditors by ordering liquidation against the expressed desires of these creditors, the proper course was to conserve and decree the sale of the Corporation's property as was done.

If there was any absolute right in the matter, it was a right in the complainants to have a prompt public judicial sale of all their debtor's assets; for the proceeding was in substance an equitable execution, and a creditor has a right to a prompt execution against his debtor's property.

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265.

In the absence of any absolute right, courts quite properly have given consideration to the wishes of the large majority of bondholders, whose chief concern is to salvage their claims to the best advantage.

Fearon v. *Bankers Trust Co.* (C. C. A., 3rd Cir., 1916), 238 Fed. 83, at 87 and 88.

As against this right of the complainants, the petitioner suggests that the District Court should have experimented with the petitioner's theory of piecemeal liquidation, at the expense of 96% of the creditors, who felt that their best interests would be served by an immediate public judicial sale of all the properties of the Corporation in the usual manner. To say the least, there is grave doubt as to the right of the District Court to defer indefinitely a judicial sale of the properties of a debtor, in the hope that changing conditions will produce a better price. At best, it would have meant that the District Court was indulging in a mere speculation as to the future trend of economic events. As a matter of fact, this the District Court declined to do, saying very wisely in respect of the petitioner's contention that

> ". . . it is possible, and we hope, that conditions will improve in the near future, but in view of the fact that the expenses of the receivership are very heavy, and the operation of the defendant company is at a considerable loss, we feel it would be improper to undertake to exercise a gift of prophecy which has not actually been conferred upon us. Such attempt might well result in greater loss" (R. 281).

Reviewing this statement after more than eighteen months, it must be perfectly obvious that there has been no change of conditions which would have permitted the successful liquidation for cash of the idle plants and inventory of a defunct industrial enterprise with any greater advantage of the creditors or at a higher distributive share than provided for in the confirmed purchase price.

IV.

The Plan of Reorganization was fair and was not in contravention of any principle of law or equity.

In Point II of the petitioner's brief, the contention is made that the Plan of Reorganization is contrary to the principles enunciated by this Court in *Northern Pacific Ry. Co.* v. *Boyd* (1913), 228 U. S. 482.

The rule of the *Boyd* case briefly stated is that a reorganization will not stand as against creditors, if such reorganization permits stockholders to retain an interest and at the same time excludes creditors from participation in the reorganized enterprise on a fair and equitable basis.

In the instant case, the Plan provides that every creditor may participate in the reorganization on the same basis as every other creditor and the creditors as a body will be the sole owners of the reorganized enterprise except for the small amount of common stock which is given to preferred stockholders of the old Corporation. **The Reorganization Plan is fundamentally a creditors' plan.** To the Debentureholders (and other general creditors) it allots all of the New Company's senior securities, having the same preferential value as the present Debentures, and, in addition, 78% of the New Company's common stock. Thus, practically the entire ownership and voting control of the New Company become vested in the Corporation's general creditors who elect to participate in the reorganization. If, as the petitioner says at pages 9 and 44 of its brief, the Plan gives stockholders a "free ride", the preferred stockholders get their free ride in the caboose and the common stockholders get no free ride at all, but pay a fare to ride even in the caboose.

The petitioner attempts to belittle the fact that the holders of 96% of the outstanding Debentures assented to the Plan and intimates that this wholesale participation by several thousand securityholders was the result of blind, unintelligent gregariousness. We have no means of knowing the mental processes of these thousands of securityholders, but we may be permitted to believe that many of them gave the matter serious consideration and consulted with their own financial advisers. Undoubtedly a great many were influenced directly or indirectly by the judgment and advice of competent financial advisers or such services as Moody's Investors Service, which published in its Bulletins of February 17 and 18, 1931, its wholly disinterested recommendation of the Plan of Reorganization (R. 356).

The petitioner's other objection to the Plan is that the New Company is to assume and undertakes to pay in full the claims of certain merchandise and service creditors. It will be observed, however, that this payment in full is not to be made from the proceeds of sale or other fund of the receivership estate, but by the New Company, (that is, only at the expense of those creditors who join in the Plan). The amount due for services was negligible (R. 461). The claims for merchandise amounted to about $40,000 (R. 459, 462) out of a total indebtedness of upwards of $12,000,000 and were in number 396 (R. 459)—all open accounts of comparatively small amounts averaging about $100 each. Under such circumstances, the Reorganization Committee considered it wise to preserve good credit relations with the merchandise creditors and that it would enhance the good-will of the New Company if these merchandise claims were paid in full. Moreover, the expense and labor of issuing new securities for so many small claims was wholly disproportionate to their

small amount. The provision with respect to the handling of these claims was dictated by sound business considerations and plain common sense. The alleged preference means so little to any creditor in point of dollars as to be trivial. Contrary to the statement in the petitioner's brief, none of these claims has been paid. They have not been paid and will not be paid until the Plan is finally consummated.

V.

The District Court had power to enter the confirmatory decree of September 8, 1932.

It is well settled that an appeal from a judgment does not deprive the Court below of the power to carry that judgment into execution. The confirmatory decree of September 8, 1932 was merely a step in executing the final decree of May 31, 1932, which had directed the sale, and was fully within the power of the District Court.

Hovey v. *McDonald* (1883), 109 U. S. 150.
Davis v. *Mercantile Trust Co.* (1894), 152 U. S. 590.
Duncan v. *Atlantic, M. & O. R. Co.* (E. D. Va., 1880), 88 Fed. 840.
Gay v. *Hudson River Electric Power Co.* (N. D. N. Y., 1911), 190 Fed. 812.
Lesamis v. *Greenberg* (C. C. A., 9th Cir., 1915), 225 Fed. 449.

In these cases, United States Courts proceeded with confirmation of sale, notwithstanding the pendency of appeals.

It was, of course, the right of the petitioner to have a stay of execution, if the petitioner had been willing to comply with the governing statute (*U. S. Revised Statutes,*

§ *1001*). But this the petitioner refused to do. On appeal to the Circuit Court of Appeals, the petitioner filed a bond for costs only (R. 343), without filing any supersedeas bond. On September 13, 1932, the petitioner then applied to the District Court for a stay of execution which was refused (R. 476). The petitioner then, on September 15, 1932, made application to the Circuit Court of Appeals for a writ of prohibition or mandamus (Supp. R. 552). The prayer of its petition to the Circuit Court of Appeals was that, in view of the appeal, the Circuit Court of Appeals should enter an order prohibiting the transfer of the Corporation's property to the purchaser until the appeal had been decided by that Court. The petitioner declined, however, to file any further bond or to give any security against losses that might be suffered by the Respondents through continued receivership operation, and refused also to give any security that a better price or that any price at all would be obtained, if the sale already made should be set aside and a resale ordered. Under these circumstances, the Circuit Court of Appeals refused the stay (Supp. R. 564). The decision of the Circuit Court of Appeals subsequently rendered and its accompanying decree in all respects affirmed and approved the District Court's confirmatory decree (R. 534-544).

At page 50 of its brief the petitioner insinuates that the object of the Respondents in transferring the property to the purchasing New Company was to bring about a situation in which "the higher courts would be confronted with a *fait accompli*". That insinuation requires no further answer than the statement that the transfer was not made until after the stay applied for had been denied both by the District Court and by the Circuit Court of Appeals. The transfer was made then only for the purpose of en-

abling the New Company to conduct its business without the stigma of receivership; and, in view of the action of the Circuit Court of Appeals, there was no legal or moral reason why the rights and interests of 96% of the creditors should be jeopardized to await the outcome of the appeal of this petitioner.

Conclusion

From the filing of the bill of complaint on October 5, 1931, to the hearing on March 3, 1932, on the bill and answer and to fix an upset price, this petitioner never moved the District Court for the piecemeal liquidation for which it argues in its brief. For five months, with full notice of the receivership (R. 82), petitioner was content to see the properties operated by the Receivers. In short, petitioner has merely attempted to use the suggestion of liquidation as a lever to raise the upset price and to test the adequacy of the sale price by comparing this price with petitioner's own unsupported opinion of what might have been realized by a different procedure. It may be assumed, therefore, that the petitioner has never seriously sought for liquidation, but has been quite content to have the Corporation's property sold at execution sale, provided the sale price could be measured against its own theoretical liquidating values.

Moreover, the petitioner has never sought and does not seek now, equality of treatment with other creditors. Not only does the petitioner refuse to take the same thing that the creditors who adhere to the Reorganization Plan are taking, but neither will it take the same thing (viz., a dividend) that the non-assenting creditors are willing to take. At the end of its brief it frankly asks for a direction "that

this petitioner have a lien upon the assets" of the New Company "for the amount of the principal of this petitioner's indebtedness with interest, costs and disbursements, including counsel fees". Even after two years of litigation, it does not signify a willingness to apply its own method of realizing on the assets of its debtor and to take the risk of what its *pro rata* share of the proceeds then might be. What it asks for is that it alone be paid in full, with all its costs and expenses, while the other creditors are left to receive their *pro rata* share in the corporate assets, whether from the receivership estate or in new securities. "Equality is equity", and this petitioner does not seek equality but a preference. No creditor has a vested right to preferential payment.

Therefore, the decrees of the courts below should be affirmed.

Respectfully submitted,

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Counsel for Respondents Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933.

No. 62.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,
Petitioners,
vs.
RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

No. 63.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,
Petitioners,
vs.
RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY, AS TRUSTEE.

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FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, Petitioners, vs. RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.	No. 63

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY, AS TRUSTEE.

Preliminary Statement.

Bankers Trust Company is trustee under an indenture, dated August 1, 1927, executed by the defendant company to secure an issue of debentures, $10,673,000 of which are outstanding (R. 108). More than $10,188,500 principal amount of the outstanding debentures are deposited with the Respondent Reorganization Committee (R. 293). As such trustee, Respondent intervened as party plaintiff in the receivership in the District Court and prayed for the sale of

the assets of defendant company (R. 85-92), presenting for that purpose a decree of sale which, with modifications by the District Court, was entered May 31, 1932 (R. 283).

Petitioners in their brief attack the procedure in this case upon several grounds, among which are the following which directly concern this Respondent:

1. It is maintained that the District Court erred in entering the decree of sale in the form in which it was entered, in that the decree permitted the sale of all the assets of the defendant company as an entirety, including cash, Liberty Bonds and accounts receivable.

2. It is maintained that the District Court erred in failing to fix a substantially higher upset price than that which was fixed in the decree and thus that the price paid for the assets was inadequate.

POINT I.

The decree of sale fully protected the rights of Petitioners and all other non-assenting creditors.

Apart from their discussion of the adequacy of the price paid at the sale, Petitioners contend, briefly, that a small minority of the creditors of the defendant company are entitled to have its assets liquidated rather than purchased as an entirety, upon the speculative chance that such procedure would realize for the creditors a larger return.

Whether or not cash, Liberty Bonds and receivables should or should not have been sold in conjunction with other corporate assets is in the instant case of academic concern. For more than 96% of the creditors are adherents of the Reorganization Plan, under which the corporate assets have been acquired. If they were to be sold, the Court would not permit their purchase at less than their fair value. If they were not sold and reorganization takes place, the major por-

tion of their proceeds will be distributed to the reorganized company, which represents the overwhelming majority of creditors, and the distribution to non-assenting creditors will not be substantially affected one way or the other.

Petitioners apparently contend, however, that the minority is entitled to require that each parcel of property owned by the defendant corporation should have been offered for sale separately without reference to the balance of the properties, upon the theory that the existence under the decree of an opportunity to purchase the properties as an entirety must necessarily chill the bidding for individual parcels. We submit that the opposite is the case. The decree of sale provided, as is the established practice, that the property must be offered in individual parcels and that the bid for the entirety, to be acceptable, must exceed the sum of the bids for such individual parcels. This case is not one of the sale of farm lots where the purchasers would necessarily be local people who could not afford to travel to a sale. It was an offering of a large industrial property of specialized nature, and it is submitted that the District Court would have committed grievous error had it not, through permitting bidding for the entirety, given an opportunity for the purchase of the entire operatable concern.

We think it is self evident that a purchaser desiring to buy the entire concern could not reasonably be asked to take his chances upon the amount which he would have to pay in competitive bidding for each individual plant, at sales held upon successive days or simultaneously, without knowing what the total of his bid must be in order to purchase an operatable entirety. The existence of the danger, without a provision for sale as an entirety, that he could not calculate the total amount he would be called upon to spend in order to purchase an operatable entirety would be an even greater factor chilling the bidding, than is the requirement that a bidder for an individual property must remain in suspense as to whether or not he can successfully purchase it until it is determined whether or not a bid for the entirety exceeds the sum of the individual bids.

The contention of the Petitioners might have some force had they produced at the hearing upon confirmation of sale one scintilla of evidence that bidders for any of the individual parcels existed. They did not produce such evidence, presumably because they could not, and we submit that it does not exist.

POINT II.

The upset price in the decree was fixed upon adequate evidence; and the bid price was adequate in all the circumstances.

Petitioners' attack upon the procedure with respect to price may be summed up as follows: The Court, being in possession of the assets of the defendant corporation, must treat them as a trust fund and must therefore fix an upset price which must in some way represent the fair value of the properties to be sold.

As we conceive it, such is not nor has it ever been the law. This Court has not expressed itself, so far as we have been able to determine, upon the question of the necessity of an upset price as an element of a judicial sale, whether or not it is known in advance that an offer to purchase pursuant to a reorganization plan will be made. The fixing of an upset price is but a device to save the delay and expense of resale in the event of an inadequate bid. Circuit Courts of Appeals have universally held that whether or not an upset price is fixed is entirely discretionary with the Court. The most recent decision to this effect is that of the Second Circuit Court of Appeals, in *Bethlehem Steel Co.* v. *International Combustion Engineering Corp.*, 66 Fed. (2d) 409.

The historical development of the upset price has been a gradual process. It probably began with the fixing of a sum equal to the expenses of sale and the amount of prior liens, so that the Court might be assured that its debts, receivers' certificates and the like would be paid. *Blair* v. *St. Louis, H. & K. R. Co.*, 25 Fed. 232 (C. C. E. D. Mo., 1885).

The next step was to assess the earning power of the properties. *Central Trust Co.* v. *Washington County R. Co.*, 124 Fed. 813 (C. C. D. Me., 1903). This development is sketched in Weiner: *Conflicting Functions of the Upset Price in a Corporate Reorganization*, 27 Col. L. Rev. 132 *et seq.*, at 140.

In later railroad cases, evidence has been received as to the market value of the reorganization securities. Weiner, *op. cit.*, page 141.

Fundamentally these are the same considerations which must guide the District Court in reaching a determination that the bid price was fair. Of course that determination must be reached upon the best available evidence and upon an adequate showing. We submit that such was plainly the case here.

The upset price included in the decree of sale in this case was determined upon by the Court after a hearing lasting three days (R. 133 to 267), at which witness after witness testified and was cross examined by Petitioner's counsel upon such questions as estimated value of the properties, earning capacity, market value of the debentures, the amount of cash and Liberty Bonds on hand, the value of accounts receivable, and the like. There was a further day given to legal argument (R. 269).

Petitioners seek refuge in this Court's *dictum* in the case of *National Surety Co.* v. *Coriell*, 289 U. S. 426, and lay great stress upon the contention that the District Court did not have before it an "independent" appraisal of the properties to be sold. Apparently it is their interpretation of the decision in that case that such appraisal is a *sine qua non* of an adequate finding as to upset price. We submit that this Court did not and will not so hold. In the *National Surety Company* case there was no judicial sale at auction with bidding open to all the world. Nor was there *any* evidence to support the District Court's decree. Petitioners have seized upon and attempted to isolate a single element which this Court listed as one of those which *might* have been offered as evidence in support of the decree. We think it is

manifest that the evidence produced at the hearing in this case upon the fixing of the upset price comprised a careful appraisal by those most familiar with the properties with the fullest opportunity for the minority to be heard and to examine. In addition testimony was taken at length (for two whole court days) upon the hearing before the District Court upon the motion to confirm the sale and thus the action by the District Court in confirming the sale was taken not only with evidence as to a fair upset price but with evidence of adequacy of the actual sales price.

We submit that this Court should not and will not make a rule of thumb as to the elements required in *every* case to ground a finding that a particular price is adequate and fair under the circumstances, but will leave to the sound discretion of the District Court the determination of what evidence the circumstances require, and upon such evidence the lowest reasonable figure at which the Court, in fairness to the minority will permit the majority to purchase the assets. The record here shows that the District Court exercised a sound discretion upon proper evidence and with full opportunity to all parties to be heard and to examine.

The decrees should be affirmed in all respects.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.,

Respondents.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.,

Respondents.

BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONER INTERNATIONAL HEATER COMPANY.

LAWRENCE BENNETT,
MAYNARD TEALL,
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BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONER INTERNATIONAL HEATER COMPANY.

Opinions of the Courts Below

The opinion of the District Court filed simultaneously with the entry of the final decree of sale is printed at pages 280-283 of the printed Transcript of Record. The opinion of the District Court filed in connection with the decree confirming sale is printed at page 463 of the Record. Neither of these opinions has been published. The opinion of the United States Circuit Court of Appeals for the

Third Circuit is reported in 64 Federal Reporter (2d Series) at page 847, *et seq.*, and appears in the printed Transcript of Record at pages 534-544.

Jurisdiction

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., § 347a).

Statement of the Case

As in the case of the briefs of the other petitioners in these and companion cases, it is incumbent upon Respondents at the outset to rectify the erroneous picture painted by the numerous inaccuracies and omissions set forth in the brief of petitioner International Heater Company (*figures in italics referring to pages of said petitioner's brief*).

International Heater Company is the owner of $60,000 of serial notes, which are part of a total of $100,000 of such notes, all dated December 31, 1928 and maturing at the rate of $20,000 on December 31st of each year, beginning December 31, 1929. The $20,000 note maturing December 31, 1929 and the $20,000 note maturing December 31, 1930 were paid. The notes now held by International Heater Company by their terms mature as follows: $20,000 on December 31, 1931, $20,000 on December 31, 1932 and $20,000 on December 31, 1933; interest in each case being payable at maturity (R. 132). The entire $100,000 of notes were taken by International Heater Company as the purchase price for the sale by it to National Radiator Corporation of one-third of the capital stock of a corporation known as Lincoln Radiator Company (R. 435). The other

two-thirds stock interest in this Company had come to National Radiator Corporation from two of its constituent companies, at the time of the merger of 1927. Hence, these notes are in exactly the same category as the Debentures of the defendant. They were issued as funded debt of the Corporation, in connection with the acquisition of capital assets. International Heater Company, as the holder of these notes, is thus just as much a member of "the security holder class" as any holder of Debentures. Since the consideration for these notes was capital stock, it is obvious that International Heater Company is not a merchandise creditor and has not, as frequently stated in petitioner's brief (*8*), **invested any money** in National Radiator Corporation. It is also obvious, that the acceptance of these notes by International Heater Company was just as much a voluntary act on its part in connection with its sale of stock as was the investment in Debentures by the Debentureholders. Petitioner's *ex parte* version (*20, 21*) of what led up to its acceptance of these notes is not supported by the Record, as petitioner at page *20* of its brief admits, nor is it relevant to these proceedings. The recriminations in petitioner's brief can have no bearing on its present legal rights as a holder of the notes which it accepted in 1928.

It is not true, as stated in the petitioner's brief, that "every other creditor not a Debentureholder is to be paid in full" or that the petitioner International Heater Company "has been arbitrarily transferred from its own class into the security holder class" (*3*). The only creditors who are to be paid in full under the provisions of the Plan of Reorganization are creditors for "taxes, wages, services and merchandise" (R. 37). In the first place, no creditors,

other than those having a statutory preference (such as taxes and wages), are to be paid in full out of the receivership estate. **It is the New Company, the assenting creditors, which will assume and pay the liabilities for services and merchandise** (R. 37). At the time the decree was entered, outside the Debenture indebtedness, there was owing to pre-receivership creditors a total of $157,511.89 (R. 295). Of this amount, $40,075.15 was owing to merchandise creditors (R. 462); and the amount due for personal services was negligible (R. 461). The remainder of this unsecured indebtedness consisted of the $69,977 owing on petitioner's notes for principal and interest and a large number of other miscellaneous claims which are listed in detail in the Statement of the Receivers filed with the District Court on July 28, 1932, as provided in Section 54 of the decree (R. 343). There is at least $40,000 and perhaps as much as $65,000 (depending on the Court's settlement of claims under leases*) owing to general creditors other than Debentureholders and International Heater Company, which is not within the category of liabilities which are to be paid in full by the New Company. The true fact is that International Heater Company has not been arbitrarily put in a special class. It has been kept in the class to which it properly belongs; and this was the holding of the Circuit Court of Appeals (R. 543).

It was not the Receivers, but the Respondents (as complainants below) and Bankers Trust Company, Trustee, who applied to the District Court to fix an upset price and for a decree of sale (*3*).

The petitioner was not only permitted to intervene in this cause on March 31, 1932 (R. 133), but it had two months

*See page 69 of the Statement of Receivers, which is an original exhibit filed with the Clerk of this Court (Supp. R. 551).

between the time of its intervention and the entry of the decree of sale on May 31, 1932 (R. 283) to make any application to the Court which it might desire, and thereafter a period of more than eleven weeks in which to prepare evidence and to submit the same at the hearing on confirmation of sale held August 18, 1932 (R. 389, *et seq.*). At this hearing, counsel for the petitioner was present and neither then nor at any other time was petitioner "refused a hearing and treated with disdain" (*11*) or denied the opportunity "to offer evidence" (*19*).

Finally, the petitioner avers (*26*), that the Reorganization Plan promulgated by the respondents "was to be submitted to the 'security holders' and not to this petitioner", which, of course, is not true, since the Plan itself provides for the inclusion of the petitioner, expressly stating that "all general creditors of the Corporation * * * whose claims shall be duly established, unless such claims are otherwise adjusted, shall be entitled, upon the consummation of the Reorganization, to receive new securities upon the same basis as the holders of the existing 6½% Debentures of the Corporation" (R. 44). Moreover, the Chairman of the Reorganization Committee, very early after the Reorganization Plan had been promulgated, wrote to the petitioner a letter stating that petitioner would be admitted to participation in the Plan of Reorganization upon the same basis as the Debentureholders (R. 431, 457).

ARGUMENT

I.

Every creditor had ample opportunity to be heard with respect to the sale of the defendant's properties and the adequacy of the purchase price.

The judicial sale of course was consummated only upon its confirmation by the District Court by its decree of September 8, 1932 (R. 463), after the hearing of August 18, 1932.

Nevada Nickel Syndicate v. *National Nickel Co.* (D. Nev., 1900), 103 Fed. 391.

Petitioner apparently proceeds upon the theory that its failure to be present at the hearing on upset price was, in and of itself, a complete deprivation of all opportunity to be heard as to the adequacy of the purchase price of the properties sold under the decree of sale. We submit that this theory of petitioner rests upon a complete misconception of the purpose and function of upset price in connection with a public judicial sale. The adequacy of the purchase price was to be determined at the hearing on confirmation and the determination and fixing of an upset price prior to that hearing was only in the interest of possible bidders and to avoid the necessity of a resale were the purchase price not adequate, in the light of all the circumstances. As stated by the Court in *Guaranty Trust Co.* v. *Chicago, M. & St. P. Ry. Co.* (N. D. Ill., E. D., 1926), 15 Fed. (2d) 434, at 442:

> *"Manifestly the naming of an upset price is not a ruling that a bid as low as the upset price will be approved in the end* * * *. And when the bids are be-

fore the court their adequacy will be determined in the light of all the circumstances after an opportunity has been given to all stockholders, bondholders and other parties in interest to be heard * * *.

"* * * *And the court is always in a position to protect the rights of all parties upon the formal consideration of a bid actually made* * * *

"* * * The question (of upset price) is entirely different from that of the adequacy of a bid which has been actually made, and which is formally before the court for acceptance. The court is asked to indicate its view as to the very lowest bid for whose adequacy the proponents will be permitted to contend when it is brought before the court. If the adequacy of a bid is fairly debatable, and no higher bid is offered, certainly a chance should be given upon a formal hearing to support the bid. It was with this in mind that the hearing as to the upset price has been upon affidavits." (Italics ours)

The fixing of an upset price is not a necessary element of proper procedure in a public judicial sale (unless required by local statute) and in the Federal courts a decree of sale without any upset price is proper, leaving the whole question of the adequacy of the purchase price for determination at the hearing on confirmation of sale.

Provident Life & Trust Co: v. *Camden & T. Ry. Co.* (C. C. A., 3rd Cir., 1910), 177 Fed. 854.

In fact, in *Simon* v. *New Orleans, T. & M. R. Co.* (C. C. A., 5th Cir., 1917), 242 Fed. 62, a petition by a minority bondholder requesting the fixing of an upset price was denied, reserving to him the right to oppose confirmation.

After the sale had been directed by the decree of May 31, 1932 (R. 283), notice of sale was duly published once a

week for four consecutive weeks, beginning July 6, 1932, in newspapers in the cities of New York, Buffalo, Boston, Baltimore, Washington, Richmond, Trenton, Pittsburgh, Johnstown, Cincinnati and Chicago (R. 368). The notice of sale itself gave more than six weeks' specific notice that a hearing would be held at 10:30 A. M. on August 18, 1932 before the District Court, to consider the confirmation of the sale and to hear complaints as to the fairness of the Plan of Reorganization. The sale was held on August 8, 1932. On August 12, 1932, a further notice of the hearing upon confirmation and the fairness of the Plan was published in the same newspapers in which the notice of sale had been published (R. 465), so that there can be no question but that all concerned and particularly this petitioner had full opportunity to prepare for the hearing and to produce witnesses to show that the bid price was inadequate and/or that the Plan was unfair, if that was in truth its firm conviction. At this hearing, counsel for International Heater Company was present, but was not prepared to offer any testimony, although the Court assured him that he might introduce any testimony he desired (R. 396). Although that was the proper time and place for him to protest against the impropriety of the sale or the inadequacy of the bid, and although one of the written objections filed by this petitioner was that the price bid was grossly inadequate, counsel for the petitioner stated to the Court only that he would like to produce testimony as to the "general fairness of the plan" and "many other inequities in this plan" (R. 394 to 396), but he did not suggest that he would like to offer any evidence as to the adequacy or inadequacy of the bid. An examination of the Record will show that this petitioner's real grievance was, that

petitioner was not to be paid in full under the terms of the Plan as were the merchandise creditors. Counsel for this petitioner admitted that he had had notice of the hearing for some considerable time, but stated "I didn't want to bring a lot of witnesses here without knowing what would be heard or gone into" (R. 396), notwithstanding that the decree of May 31, 1932, entered two months after the petitioner had become a party to this cause, provided in Section 34 (R. 299) that the purpose of the hearing was **"to order the confirmation or disapproval of said sale, to order such further and other sale, if any, as may be deemed advisable,** to hear complaints upon the matters referred to in Section 36 of this Decree and to make such orders in the premises as it may deem proper", and notwithstanding that Section 36 of the decree (R. 302) provided that at this hearing **"this Court will hear complaints as to the equity of the provisions of any such plan or agreement of reorganization, including the Plan and Agreement hereinabove referred to,** affecting the respective priorities of all persons and corporations interested in National Radiator and its property", and notwithstanding that the notice published on August 12, 1932 contained similar notice of the precise purpose of the hearing.

The petitioner International Heater Company, had known of the receivership long before the hearing on upset price and had retained counsel at Pittsburgh to watch these proceedings (R. 452), but had not asked leave to intervene or asked counsel conducting this suit to keep it advised as to the course of proceedings, as had First National Bank of Cincinnati (R. 448-450). Petitioner did intervene as a party by order entered March 31, 1932 (R. 133). In its petition for leave to intervene, petitioner refers to the

hearings on upset price which took place on March 3 to 7, 1932 and states that its rights have been unprotected and that "the court could protect the rights of your petitioner much more fairly and adequately if your petitioner were a party to this litigation and thus in a position properly to present its evidence" (R. 131). The prayer of the petition was, that petitioner "may be made a party defendant to this suit and allowed to intervene and defend the same; or that it be permitted to file a bill of intervention and have such other and further relief as may be just and equitable" (R. 132). For some reason, however, this petitioner, although it claimed in its petition, and now claims, to have been aggrieved by the character and conduct of the proceedings which had been had, did nothing. It did not attempt to defend this suit, nor did it file any bill of intervention or ask for any other relief. It made no application to the Court for an opportunity to be heard or to produce testimony on any subject. **This petitioner remained quiescent while the Court had the matter under advisement for two months, and did not become active until July 23, 1932, three and one-half months after its intervention, and seven weeks after the entry of the decree,** when it joined with First National Bank of Cincinnati in appealing from the decree of sale (R. 332), after the publication of notice of sale had been practically completed at great expense (R. 368). So far as the Record shows, International Heater Company intervened solely for the purpose of joining with First National Bank of Cincinnati in appealing from any decree that might be entered and not with any earnest purpose of seeking an opportunity to be heard on the entry of a decree of sale. Thus, this petitioner is in the position of seeking to make the most of alleged de-

fects in the proceedings which were had, although it never availed itself of its ample opportunity to remedy these defects. The law does not tolerate that a party who might have taken an objection to the time, terms, and manner of the sale, as provided for in the decree, should designedly wait until the property has been offered for sale, and then attempt to frustrate or set aside the sale.

Nevada Nickel Syndicate v. *National Nickel Co.* (D. Nev., 1900), 103 Fed. 391, 394;
Leadville Coal Co. v. *McCreery* (1891), 141 U. S. 475, 478.

As was said by the Court in *Simon* v. *New Orleans T. & M. R. Co., supra,* page 64:

> "The original order was intended to preserve petitioner's rights to object to the confirmation of the sale for inadequacy of price or for any other legal reason * * * Petitioner has not availed himself of his right to oppose the sale, *but has attempted to engraft another form of action, sui generis, on the proceedings heretofore had.*" (Italics ours)

In this connection, petitioner also makes the charge that its co-petitioner, First National Bank of Cincinnati, was not given notice of these hearings, but only "fortunately learned of the proceedings and was present" (*6*); and at page *18* of its brief petitioner categorically asserts that this was an intentional omission. This charge of want of good faith on the part of counsel for the Respondents was made at the hearing before the District Court on confirmation of sale and was indignantly denied at that time by counsel. (R. 450). It is not made in the brief of First National Bank of Cincinnati and we had assumed that counsel for the petitioners no longer entertained any doubt that am-

ple notice of the hearing had been given to the First National Bank of Cincinnati in pursuance of its previous request. As the point has been raised again in this Court, the challenge to the integrity of counsel makes it incumbent upon us to remove all doubt on this score. To this end, we include a copy of a letter written under date of February 18, 1932 (two weeks before the hearing), by counsel for the Respondents to counsel for the First National Bank of Cincinnati, reading as follows:

(Letterhead of Milbank, Tweed, Hope & Webb)
15 Broad Street
NEW YORK

"February 18, 1932

National Radiator Reorganization

Mr. Ralph Royall,
20 Exchange Place,
New York, N. Y.

Dear Mr. Royall:

I assume that you have already received advices from Mr. Horace Baker of Pittsburgh, that a hearing will be had on March 3, 1932 before the Federal Court in Pittsburgh, for the purpose of settling a decree of sale which will involve, among other things, the fixing of upset prices. In any event, I am writing you in accordance with my assurance that I would advise you in advance of any such hearing.

Very truly yours,

Lawrence Bennett."

II.

The Plan of Reorganization was fair and there was no error by the lower Courts in approving it.

The petitioner sets forth in its brief at some length the reasons for its unwillingness to participate in the Plan of Reorganization. Fundamentally the petitioner is not satisfied with the management. This, of course, is a matter of opinion, but we submit that this suit was not, and could not properly have been converted into, a trial of the management. This opinion of petitioner, which is a competitor of National Radiator Corporation, cannot have any bearing upon the question as to whether the Plan accords fair treatment to all creditors. International Heater Company has no greater rights than any other non-assenting creditor, who may have some other reason for declining to join in the reorganization. So far as the Record is concerned, the fact is that the management of the New Company, which did not assume the direction of the defendant until February 1930 (R. 452, 453), is the same management which conducted the operations of the old National Radiator Company of Pennsylvania with conspicuous success. There is certainly nothing in the Record to support the assertion of mismanagement on the part of anyone. The letter of February 28, 1931, published by the so-called "Protective Committee", has no probative force whatsoever. At the most, this letter is a mere assertion of a group of individuals who had no intimate knowledge of the Corporation's affairs, and the fact that they later approved and adopted the Plan of Reorganization in itself constitutes a retraction of their charges and an affirmance of their confidence in the management of the New

Company. If, however, this petitioner continues to believe that the properties of National Radiator Corporation have been and will be mismanaged, it is privileged to maintain that belief and to refuse to participate in the reorganization. But this belief cannot change petitioner's rank or entitle it to preferential treatment.

This petitioner, like its co-petitioner First National Bank of Cincinnati, attempts to belittle the fact that the holders of 96% of the outstanding Debentures consented to the Plan, and petitioner surmises that this is no evidence that they approve the Plan, but merely shows that they joined the Plan because they knew not where else to go. By a curious process of logic, petitioner deduces from this surmise that probably the Plan was no good. We do know, however, that for nine months, while the so-called "Protective Committee" was in existence and actually opposing the Plan and while there *was* somewhere else to go, 80% of all the outstanding Debentures were deposited under the Plan; and we also know, that after this Protective Committee had approved the Plan, there was in existence a second Protective Committee (R. 399, 400) which acquired only $71,000 of Debentures and which is represented by Amy Arzt, the petitioner in companion case No. 64. Of course, we have no means of proving the mental processes of the thousands of Debentureholders who deposited under the Plan of Reorganization, but there is no foundation for the surmise that they deposited because they knew no better. We also know that the banking houses which had sponsored this issue (R. 417) approved the Plan as good, and we know that Moody's Investors Service in its Bulletin of February 17 and 18, 1931 gave its wholly disinterested recommendation of the Plan of Reorganization (R. 356).

Petitioner's only specific complaint which goes to the fairness of the Plan of Reorganization, is that the Plan provides that certain specified liabilities of the defendant shall be paid in full by the New Company. Let us see what this really amounts to. The liabilities which are so to be paid in full are liabilities for taxes, wages, services and merchandise. There is no question about the propriety of paying taxes or wages which are by statute entitled to a preference.* It comes down then to the question of services and merchandise.

As we have pointed out above at page 4, the amount due for personal services is negligible (R. 462) and the amount due to merchandise creditors is only $40,075.15 (R. 462), out of a total indebtedness, other than Debenture debt, of $157,511.89 (R. 295); and as already shown above, there is at least $40,000 owing to general creditors, other than Debentureholders and International Heater Company, which is not provided by the Plan to be paid in full. International Heater Company has not been "singled out" for unfavorable treatment. This petitioner's real grievance is that it has not been accorded the favorable treatment which the Reorganization Committee thought wise to accord to merchandise creditors.

There were sound practical reasons for paying merchandise creditors. The claims for merchandise were 396 in number (R. 459), all open accounts of comparatively small but odd amounts, averaging about $100 each. The expense and labor of issuing new securities for so many small claims was wholly disproportionate to the amount involved. For example, a merchandise creditor with a claim of $75.50 would, if treated like Debentureholders, receive scrip for

*43 Purdon's Pa. Statutes Annotated (1931), § 221.

$37.75 of New Debentures, another piece of scrip for .3775 of a share of new preferred stock, a certificate for one full share and a further piece of scrip for .51 of a share of new common stock. Under these circumstances, the Reorganization Committee considered it wise and proper as a business matter to preserve good credit relations with merchandise creditors.

Nevertheless International Heater Company complains that this provision of the Plan makes the Plan unfair. And by this we suppose is meant, that International Heater Company would receive unfair treatment if it participated in the Plan; that is, would suffer some pecuniary disadvantage. Let us see what the unfairness would amount to if International Heater were to participate in the Plan.

These merchandise creditors are admittedly entitled to their distributive share of the cash proceeds of this sale, and we may assume that this would come to 20 cents on the dollar. It means then that the total preferment of all the merchandise creditors amounts to 80 cents on the dollar for claims of $40,075.15, which is about $32,000. International Heater Company's share of the total corporate indebtedness is slightly over ½ of 1%. **In other words, the money damage to International Heater Company by reason of the alleged unfairness is ½ of 1% of $32,000, or $160.**

The question before the District Court was not whether this is a perfect plan of reorganization, or whether it is or is not the best business judgment to make the provision for the payment of merchandise creditors. The only question was whether this Plan as written and approved by 96% of the creditors is so unfair that it does not merit the approval of a court of equity. Courts do not sit to redraw or modify such voluntary business arrangements.

Conley v. *International Pump Co.* (S. D. N. Y., 1915), 237 Fed. 286.

Petitioner's brief advances the novel doctrine that "short-term creditors" have some prior right or preference over long-term creditors. Petitioner's argument is in substance that a "short-term creditor" (how short is not made plain) has some right to insist that the early maturity of his debt obligates the debtor to bleed itself to the last penny of cash and to wreck the business in utter disregard of all other creditors, so as to pay each short-term creditor in the order of maturity as long as the money lasts. There is no authoritative basis for any such doctrine and petitioner cites none. Even if there were such a doctrine of preference for "short-term creditors", the actual application of the principle to the instant case would not produce the result desired by petitioner. Petitioner's notes mature, $20,000 on December 31, 1931, $20,000 on December 31, 1932 and $20,000 on December 31, 1933. If the principle of payment in order of maturity is to be adhered to, petitioner must grant the rights of the Debentureholders to receive their semi-annual installments of interest and sinking fund as they mature. They too are short-term creditors. Thus, in the application of petitioner's own principle, it is true that petitioner would receive payment in full of only the $20,000 note maturing on December 31, 1931, but, long before the maturity of its next maturing note due December 31, 1932, every penny of the Corporation's cash would have been more than exhausted by the payment of interest and sinking fund installments to Debentureholders, as required by the terms of their Debentures and the Indenture.

It may be observed, however, that the doctrine advanced

by petitioner, in its application to the instant case, would have involved a preference under the Bankruptcy Act even as to the note due December 31, 1931. On any fair valuation, the liabilities of National Radiator Corporation exceeded its assets at December 31, 1931, and payment of petitioner's $20,000 note due on that day would clearly have been a preference. Petitioner's frequent allusions to the defendant as a "perfectly solvent corporation" are of course rhetorical and utterly at variance with the evidence and with the findings of the Courts below (R. 523-524 and 537).

Finally, if there is any merit in the claim of petitioner to be paid in full as a preferred "short-term creditor", this is a claim which petitioner should assert by application to the District Court for full payment of its claim out of the proceeds of the sale of the Corporation's property. Such a claim should not be asserted by appeal from the decree of sale or the decree confirming the sale. These decrees did not properly deal with questions of priority in the distribution of the proceeds of sale, all of which were reserved by the District Court for further consideration (R. 310).

III.

The provisions of the decree of sale were proper and the sale made thereunder was properly confirmed.

In specific criticism of the decree, the petitioner first complains (*5*) that Respondents were given an advantage, in that the Court allowed them $300,000 "to carry out their plan" and allowed "nothing at all to non-

assenting creditors for the purpose of presenting their side of the case". But the fact is that the Court did no such thing. Thus far, the Court has allowed nothing to the reorganizers to carry out their Plan. All questions as to allowances were, by the decree, reserved for further determination (R. 310), and when the matter of allowances is presented to the District Court, petitioner will have ample opportunity to be heard. The $300,000 referred to is a part-payment of the purchase price required by the District Court and, under the terms of Section 48 of the decree of sale (R. 309-310), this fund is in part to be used for administrative allowances, including unpaid indebtedness and liabilities and compensation of the Receivers and will in large part be used also to pay the distributive dividend upon $400,000 or more of claims of creditors (including petitioner) not participating in the reorganization. There is no reason why petitioner should not bear its small *pro rata share* (about one-half of one per cent.) of the legitimate costs and expenses of this suit, which is to produce the fund out of which petitioner will be paid. In any event, 96% of these costs and expenses will be borne by the creditors who assent to the Plan. It is of course erroneous to say that the "present decree makes the non-assenting creditors alone pay their opponent's expenses and allowances" (5).

Petitioner criticizes the inclusion of cash in the sale and intimates that it was included to create a deceptive upset price. We fail to understand what the deception is, but the fact of the matter is that the inclusion of the cash in the sale was primarily a matter of convenience. Every one knows that cash is cash, and the inclusion of the cash in the property sold had no bearing upon the upset price

for the property other than cash, and for the same reason has no bearing upon the ultimate distributive share of non-assenting creditors. The inclusion of the cash in the properties sold, however, does facilitate getting the cash into the hands of the New Company, where it would ultimately go in any reorganization, and, if it were not included as a part of the properties sold, it would have to be distributed as a dividend and 96% of it would go to the Reorganization Committee, who would then turn it over to the New Company. The inclusion of cash in the sale is simply to avoid this cumbersome process. The result to everyone is the same. At the time of the sale, there was $1,551,615.78 cash and equivalent on hand (R. 402). If it had been excluded from the sale and left with the Receivers, the Reorganization Committee would have been entitled as the holders of about 96% of the debt to receive on distribution $1,440,000, and the pro rata share of the $400,000 of non-assenting claims would be about $60,000.

Petitioner criticizes the method of selling, on the ground that it was too well adapted to exclude all bidders except the Reorganization Committee (*13*). Complaint is made of that provision of the decree with respect to offering the property first in parcels and then as an entirety (R. 300). This is a customary provision and is sanctioned by the courts. In *Quinton* v. *Neville* (C. C. A., 8th Cir., 1907), 154 Fed. 432, 438, in approving a similar provision, the court said:

> "There is an important provision of the decree, well to be noted. It provides for the sale of the divisional parcels separately, and at the conclusion thereof the master shall put the whole tract up and offer it in bulk, with directions to accept the bid or bids which

produce the larger sum of money. This is the customary method of conducting such sales in equity, as experience has demonstrated that it is attended with the best results."

Complaint is also made of the provision in the decree (*14*) that the purchaser was "required to assume all obligations of the Receivers under any then existing executory contracts, leases and agreements entered into, assumed or adopted by the Receivers" (R. 306), and it is stated that the District Court pointed out that this required the purchaser to some extent to buy "a pig in a poke" (R. 153). Counsel for the petitioner is under a misapprehension as to what the Court was criticizing when it made this remark. That remark of the Court referred to the draft decree which was originally submitted by counsel for complainants and which contained provisions requiring the purchaser to assume not only the liabilities of the Receivers under existing executory contracts, leases and agreements, but also all costs, expenses and liabilities of the receivership, including compensation of the Receivers, counsel fees and allowances; substantially all the items which are now to be paid out of the $300,000 fund required by Section 48 of the decree and which has been referred to above. It is not true that "the decree as printed was presented to the District Court and signed" (*14*). The fact is that the decree which was finally signed after two months consideration, embodied numerous changes required by the District Court, among them being the elimination of the above mentioned provisions which the Court had thought objectionable because of their indefiniteness. The Court also insisted upon the insertion in the decree of the provision that $300,000 of the purchase price should be paid

immediately in cash (R. 307). The Court directed the retention of the provision that the purchaser should assume "all obligations of the Receivers under any then existing executory contracts, leases and agreements entered into, assumed or adopted by the Receivers". We fail to see how the Court could have provided otherwise for the performance of these obligations which had been incurred by the Court's Receivers in carrying on the business. The nature of these contracts, leases and agreements was fully disclosed, however, in the Statement which was filed by the Receivers under Section 54 of the decree (Supp. R. 551).

The provision for the requirement of earnest money to make good a bid is so universal that it requires no comment.

Complaint is also made of the inadequacy of the upset price, upon the basis of the testimony taken before the District Court (*14*). As dealt with at considerable length in our other brief in this case, we have shown that the District Court conducted an extended and impartial investigation of the nature and value of the defendant Corporation's properties, before fixing an upset price for the same, and after the sale there was a further hearing on confirmation of sale, with opportunity for all persons interested to be heard. Petitioner's brief analyzes this testimony in detail (*pages 15 to 18*). Here, again, as in our other brief in this case, we must emphasize that the real question now involved in this case is whether the District Court erred in confirming the bid at the sale held on August 8, 1932, on the basis of the assets as then constituted. At the time of such sale, the amount of cash and equivalent in the hands of the Receivers was not $1,929,807.59, but had been reduced to $1,551,615.78 (R. 402), and there had also been

a shrinkage of more than $200,000 in the notes and accounts receivable, which stood at $858,992.41 on December 31, 1931, and at $641,189.17 on June 30, 1932 (R. 523), a total shrinkage of $595,995.

The Sanderson & Porter appraisal of the Corporation's properties as of December 31, 1926 was merely indicative of their replacement costs.

As for the evidence which was taken preliminary to this hearing in New York, at the office of Bankers Trust Company, it was all of a formal nature, relating to such matters as the making of the Indenture, the issuance of the Debentures and other matters which have never been involved in controversy. An examination of the depositions setting forth such "formal proof", offered in evidence at the hearing on March 3, 1932 (R. 133) and included in the Record (R. 102-130), will show that they relate to nothing involved in controversy here.

The petitioner alludes to the fact that at a meeting of the Reorganization Committee held on November 28, 1931, they gave consideration to the probable amount of the upset price (R. 518). As holders at the time of more than 90% of the Corporation's indebtedness, the Committee were potential purchasers of the Corporation's properties at any judicial sale, and it was of course proper for them to consider what sum they could afford to bid for those properties and with what amount of cash, after provision had been made for the distributive share of non-assenting creditors, the New Company could continue and carry on business.

The petitioner offered no testimony of values and made no suggestion as to how the properties of the Corporation could have been better disposed of than through confirma-

tion of the sale to the Reorganization Committee. The petitioner does not now wish to come into the Reorganization under the Plan, as stated at page 8 of its brief, but wishes, as intimated at page 18, merely to get as large a percentage of its claim as possible.

It is easy to characterize the bid price as "absurd" and "ridiculous" by pointing to the disparity below old book values and by ignoring the condition of the property at the time of sale; but when it comes to the actual problem of liquidating and realizing a larger sum, any liquidator would be faced with the cold, hard necessity of finding buyers. Those who have had experience in attempting to liquidate bankrupt estates know what the difficulties are, and the disastrous results of such liquidations are convincingly depicted in the Report to the President of the United States on the Bankruptcy Act, made by Solicitor General Thacher under date of December 5, 1931.

It may not be amiss in this connection to refer to the history of the reorganization of the National Salt Company which is described in Dewing's "*Financial Policy of Corporations*" page 965. This reorganization took place in the years 1903 and 1904, under the supervision of the Supreme Court of the State of New York. The National Salt Company had numerous plants which were carried as assets on its books at $8,518,306. A civil engineer of large experience had appraised the plants as having a market value of $1,149,200 and a total valuation at forced sale of $694,200. All the plants were offered for sale at public auction in September 1903 and were bid in for $337,500. At a hearing in February 1904, the court refused to confirm the sale because of the inadequacy of the price and the method of sale which had been advertized for only two weeks. The court ordered another sale of the property with

different terms and more publicity and the second sale took place in May 1904. At this sale, these same properties were bid in and sold for $193,310.

Conclusion.

Considering the financial condition of the Corporation, it is obvious that its resources were and are not sufficient to pay all its general creditors in full. If there had been no Plan of Reorganization, and if this Corporation had drifted into bankruptcy, this petitioner could not have hoped to be paid in full, and probably would not have received as large a dividend as will be paid to non-assenting creditors by virtue of the sale already made. Petitioner has not been diligent. It is not fitting that this petitioner should now seek, by attacking the Plan of Reorganization which is eminently fair, to secure an advantage over all other creditors of the same class, which petitioner could not secure in any other way.

Therefore, the decrees of the Courts below should be affirmed.

Respectfully submitted,

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for Respondents Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI, and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

No. 63

FIRST NATIONAL BANK OF CINCINNATI, and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITION OF FIRST NATIONAL BANK OF CINCINNATI FOR A REHEARING

RALPH ROYALL
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Counsel for Petitioner.

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FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, *Petitioners,* vs. RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.	No. 62
FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY, *Petitioners,* vs. RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.	No. 63

PETITION OF FIRST NATIONAL BANK OF CINCINNATI FOR A REHEARING

To the Honorable Charles E. Hughes, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner FIRST NATIONAL BANK OF CINCINNATI respectfully prays for a rehearing herein for the following reasons:

(1) The Court in rendering its opinion bearing date January 8, 1934 herein, dealing under the heading

"THIRD" at pages 13-18 with the position and the rights of this petitioner, clearly acted under a misapprehension.

At page 16 the opinion states:

> "The relief which the Bank seeks is that sum in cash which it would have received if the property had been sold at a proper price."

This petitioner's brief herein at the final pages thereof contains the following:

"CONCLUSION

THE DECREES OF THE COURTS BELOW SHOULD NOT BE PERMITTED TO STAND.

Since the District Court, at the behest of the complainants (the Reorganization Committee), saw fit,—notwithstanding the pending appeal from the final decree of sale dated the 31st day of May, 1932,—to make its further decree dated the 8th day of September, 1932, directing the Receivers to convey to the nominee of the Reorganization Committee, viz., the new corporation organized by such Committee, all of the assets of the corporation, and since, pursuant thereto, such assets have passed out of the hands of the Court and into the hands of the new corporation where they have since been subject to change and waste, the fund as it stood in the hands of the Court has ceased to exist, so that a direction by this Court that the fund be duly administered by the District Court has become impossible of actual performance.

Under the Plan of Reorganization, a share in the assets has been unconditionally reserved in the old stockholders, although the Plan provides

for a reduction of the interest of the creditors as such in the fund. Such stockholders stand 'in the position of insolvent debtors who cannot reserve an interest as against their creditors,' and this doctrine is the 'fixed principle * * * and to it there should be rigid adherence.'

It is respectfully submitted that this Court should under the circumstances apply the remedy used by it in the case of *Shapiro* v. *Wilgus, supra,* and in the case of *Northern Pacific Railroad Company* v. *Boyd, supra,* and direct that this petitioner have a lien upon the assets of National Radiator Corporation (Maryland), the new corporation, for the amount of the principal of this petitioner's indebtedness with interest, costs and disbursements including counsel fees. The new corporation has been admitted as a party to the cause. Although this Court in its most recent decision upon the subject (*National Surety Co.* v. *Coriell, supra*) did not apply this remedy, it should be noted, that, before the decision was made by this Court, the new corporation in that case had been decreed to be a bankrupt and a sale in bankruptcy had been made of all of its assets to purchasers who were not before the Court."

The brief of this petitioner before the Circuit Court of Appeals asked for similar relief.

In the District Court this petitioner filed an answer to the petition filed by the complainants for the approval of the Plan, by which answer this petitioner set forth the following (R. 382):

"Four. That the plan of reorganization outlined in the petition for the approval thereof is unfair, and such petition contemplates the abuse

> of the powers of this Court in Equity for the mere purpose of effectuating the proposed plan of reorganization in fraud of the rights of non-assenting creditors, including these answering respondents. * * *"

To the petition for confirmation of sale which was filed together with the petition for the approval of the Plan, this petitioner filed objection which contained the following (R. 388):

> "Thirteen. The matter of confirmation of the sale should be postponed and held in abeyance, pending the decision by the Circuit Court of Appeals for the Third Circuit of the appeal which has been taken herein by the undersigned interveners from the final decree of sale herein, dated May 31, 1932."

This petitioner also made a motion in the District Court for postponement of the delivery of the conveyances to the new corporation pending the decision of the appeal (R. 476).

The question of the unfairness of the Plan was also presented by the assignments of error (XXXIV) (R. 340). This question and the question of the Court's power to act further after the perfecting of the appeal from the final decree of sale were also presented in the petition for writ of *certiorari* which states at pages 12 and 13:

> "(4) May a Federal court of equity in such a proceeding properly make a decree of sale for the purpose of effectuating a Plan of Reorganization which reduces the rights of the creditors as such

in the assets of the corporation, while preserving an interest for its preferred stockholders without the requirement of a contribution of new capital by such stockholders as the condition of the preservation of such interest?

(5) May a Federal court of equity in such a proceeding properly decree a sale of all the corporate assets for the purpose of effectuating a Plan of Reorganization under which some of the general creditors are paid in full in cash out of the assets of the corporation, while others are relegated to a dividend based upon an upset price fixed by the Court to yield approximately 15c to 20c on the dollar?

* * *

(7) Did not the District Court exceed its jurisdiction and power in making the decree, dated September 6, 1932, directing the transfer from the custody of the Court to the new corporation of the corporate assets (the trust fund) ordered to be sold under the final decree of sale, dated May 31, 1932, these petitioners having theretofore taken and perfected their appeal to the Circuit Court of Appeals from such final decree of sale, dated May 31, 1932?"

These questions were presented in the specifications of error at page 13 of this petitioner's brief herein and were fully argued as Point II (pp. 39-49) and Point III (pp. 49-51) of such brief.

(2) While it is a fact that this petitioner at the hearing upon the application for the decree of sale contended for the fixing of an adequate upset price; this petitioner at the same time contended that the Plan was unfair and

that the Court should not decree the making at all of the sale of the property as an entirety for the purpose of effectuating the unfair Plan. This petitioner argued orally and by printed brief in the District Court that the Plan was unfair and improper in the two respects set out in this petitioner's petition for a writ of *certiorari* and in its specifications of error herein; that it worked a conversion of the interests of the creditors for the benefit of the stockholders and thus violated the "fixed principle" set out in the case of *Louisville Trust Company* v. *Louisville N. A. & C. R. Co.* and the decisions of this Court which follow it; also that it made provision for the payment in full in cash of certain general creditors but not including this petitioner. The unfairness of the Plan in these two respects was argued before the District Court and before the Circuit Court of Appeals in virtually the same manner as argued before this Court by this petitioner under Point II of its brief (pp. 39-49).

It is also a fact that, upon the application to confirm the sale and direct delivery of the conveyances and to approve the Plan, this petitioner, in support of the answer thereto which it filed and of its motion for a postponement of the delivery of the deeds pending the determination of the appeal, cited to the District Court the cases referred to at page 49 of its brief herein. These cases we believe demonstrate that the District Court should not have directed the making of the conveyance to the new corporation in the face of the pendency of the duly perfected appeal.

Before the actual delivery of the deeds and other conveyances and the making of the whole affair a *fait accompli*, this petitioner applied to the Circuit Court of Ap-

peals for an appropriate order to preserve the *status quo* until the hearing and the decision of the then pending appeal, which relief the Circuit Court of Appeals refused to grant (Supplemental Record, 550-565). This petitioner, therefore, did everything it could to prevent the final accomplishment of the conversion for the benefit of the stockholders of this creditor's interest in the corporate assets.

(3) This petitioner intervened as a party to the cause for the reason that it was advised that unless it thus became a party, it would not have the right to appeal and that the proper protection of its rights might require that it be in a position to appeal,—which turned out to be the case.

This petitioner was advised that thus to intervene would have the consequence under the provisions of Equity Rule No. 37 of prohibiting this petitioner from questioning the jurisdiction of the Court to entertain the original bill.

But we submit that clearly this petitioner had the right to question the propriety of the decrees herein and particularly to question the propriety of the making of a decree for a perfunctory judicial sale of the property as an entirety for the purpose of effectuating an unfair plan, and that this petitioner had the right in that connection to contend that the Plan was unfair and to contend, as set forth at the bottom of page 47 of our brief herein, that:

> "The interest of stockholders is in every sense subordinate to the rights of creditors. We submit that under our system there is and should be

> no judicial process,—even including a Federal equity suit for the purpose of effectuating a Plan of Reorganization,—by which the stockholders of a corporation can bring about a conversion of its indebtedness for the stockholders' benefit."

Although this petitioner admitted, as it was bound to do because of Equity Rule No. 37, that the Court had jurisdiction, this petitioner has never at any stage of the proceeding admitted that the Court could properly make a decree for a perfunctory judicial sale of the property as an entirety for the purpose of effectuating an unfair Plan. This petitioner has not gone beyond the admission, for the purpose of argument, that the Court might with propriety make such a decree for the purpose of effectuating a *fair* Plan. But from the very beginning to the end of the litigation, this petitioner has claimed that this Plan was *unfair*.

The opinion contains at page 13 the following statement:

> "It (this petitioner) concedes that the Court could properly lend its aid to effectuate the proposed reorganization and, to this end, might sell the assets as an entirety."

This does not correctly reflect this petitioner's position. This petitioner's position throughout has been that *the Court could properly lend its aid to effectuate a* FAIR *plan and to the end of effectuating a* FAIR *plan might sell the assets as an entirety.*

If, as stated at page 44 of this petitioner's brief, the Plan had been made fair by the subscription by the stockholders of a substantial fund of new money, the

right to choose the securities under such Plan might well have been a thing of value exceeding the value of the distributive share under an upset price fairly determined.

Whatever admissions this petitioner may appear to have fallen into for the purposes of argument, it is, we submit, clear from the foregoing and from the whole context of its brief that its real position throughout has been that the Plan was unfair and that the judgments appealed from were erroneous in decreeing a perfunctory sale of the assets in their entirety for the purpose of effectuating such unfair Plan. The position of this petitioner throughout has been: (1) that a perfunctory judicial sale of the assets as an entirety could not properly be decreed for the purposes of effectuating an unfair plan; and (2) that, even for the purposes of effectuating a fair plan, such decree should provide for a fair upset price. As to both of these propositions we submit that this petitioner is manifestly right.

Under the decision of this Court in the case of *Northern Pacific Railroad Company* v. *Boyd*, a judgment creating a lien for the full amount of the claim of the creditor is proper where an interest in the assets of the reorganized corporation was reserved in the stockholders,—and that for the reason that "Stockholders are in the position of insolvent debtors who cannot reserve an interest as against their creditors."

(4) It seems a strange and an unfair result that, while the petitioners Artz and Ramsey in No. 64 and seemingly, too, the petitioner Clapier in No. 65 should have, in respect of their debentures, been awarded judgment for a lien upon the assets in the hands of the new

corporation for the full amount of their claim, this petitioner should not be awarded similar relief for which it prayed, but should be relegated to further proceedings in the District Court for the determination of an upset price with the delay, uncertainty and expenses attendant thereon.

This seems especially true when one considers that this petitioner was the only debenture holder who formally intervened in the proceeding before the main hearings and defended the rights of the debenture holders, and that this petitioner thereafter, with the assistance of the intervener International Heater Company, at their own labor and expense took and perfected the appeal and printed the record.

The petitioners Ramsey and Artz on the other hand merely appeared upon the return of the motions to confirm the sale and approve the Plan and claimed that the Court did not have jurisdiction to do so. Thereafter they purported to become appellants and they had printed a small supplementary record which in the record to this Court finally appeared as pages 483 to 531. They were treated as proper appellants by the Circuit Court of Appeals and thereafter they filed petitions upon writs of *certiorari* in this Court, which petitions were entertained and granted.

As a matter of fact, however, they did not formally intervene and become parties to the record and therefore, unless their appearance is to be deemed the equivalent of intervention, they had no position to act as appellants in questioning the decrees at all, for it is axiomatic that one who is not a party to the record cannot question the decree by way of appeal. If the appearance of Artz and

Ramsey is the equivalent of intervention, they became parties "in subordination to and recognition of the propriety of the main proceeding" (Equity Rule 37) in the same sense as did this petitioner.

It would seem that the Circuit Court of Appeals and this Court, in entertaining the appeal of these other parties and the filing by them of a petition for a writ of *certiorari,* must have taken the broad view that the steps that they took in the District Court were the equivalent of their becoming parties,—in other words, the equivalent of intervention. As remarked by this Court in its decision in the *Coriell* case, as well as in its opinion herein, these proceedings should not be regarded as ordinary adversary proceedings. The positions of the parties are rather anomalous.

Strict views must be disregarded in permitting the appellants Artz and Ramsey to be heard at all in the higher Courts, and certainly, since broad views have been entertained as to the positions of some of the parties, they should all be regarded as parties in the same sense. In such a view this petitioner could raise and have the benefit of any question that could be raised by any other party. This does not need to be pressed to the point, however, that this intervener or any other was in a position to question the jurisdiction of the Court for the simple reason that this Court did not decide that the District Court was without jurisdiction.

(5) At page 13 of the opinion, this Court states:

> "The Bank does not claim that the District Court was without equity jurisdiction or that the bill lacked equity."

This petitioner has not claimed and does not claim that the District Court was without equity jurisdiction. On the other hand, it has claimed throughout the whole course of the litigation that the bill lacked equity. This petitioner's petition to intervene (R. 95) sets forth:

> "(4) The original complainants herein, Flershem, Cornell, Waters and Cahn, as the so-called Reorganization Committee and proponents of the plan of reorganization attached to their Bill of Complaint, filed their said Bill of Complaint for the purpose of bringing about the receivership herein *as a step in effectuating said plan,* notwithstanding the opposition to such plan of your petitioner and of the other dissenting bondholders who have not seen fit to subscribe to such plan."

Attention is also called to this petitioner's assignments of error as follows:

> "II. The District Court erred in holding that at the time of the filing of the bill National Radiator Corporation had no means at hand with which to meet, pay or satisfy the interest charges on the debentures. (Decree, Article IV, paragraph 26.)" (R. 333)

> "X. The District Court erred in failing to hold that the complainants filed the bill of complaint herein for the purpose of bringing about the receivership as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931." (R. 335)

> "XI. The District Court erred in holding that there was no evidence of collusion on the part

of the complainants, of the Bankers Trust Company and of National Radiator Corporation in connection with any of the proceedings herein (fol. 494). (Decree, Article IV, paragraph 27.)" (R. 335)

"XXXIV. The District Court erred in so shaping the decree as to effectuate the design of the Reorganization Committee to acquire the assets of the corporation for the purposes of the Reorganization Plan, in that—notwithstanding that the decree is so designed as to effectuate the passing of the property to the Reorganization Committee at a price very much less than could fairly be realized upon the assets if liquidated in normal course—the Plan provides for the sharing by the stockholders of the corporation in fraud and (fol. 502) in violation of the rights of the creditors, including these appellants, viz., the preferred stockholders to share freely and without any additional contribution whatsoever and the common stockholders to share upon a contribution nominal in amount." (R. 340-341)

The answer filed by this petitioner to the petition for the approval of the plan sets forth (R. 382):

"Four. That the plan of reorganization outlined in the petition for the approval thereof is unfair, and such petition contemplates the abuse of the powers of this Court in Equity for the mere purpose of effectuating the proposed plan of reorganization in fraud of the rights of non-assenting creditors, including these answering respondents. * * *"

> "Five. The final decree of sale herein dated May 31st, 1932, was made in contemplation of the complainants' plan of reorganization and this suit was brought as a mere step for the purpose of effectuating such plan. * * *"

At pages 14-15 of the petitioner's brief herein, it is stated:

> "The answer of the complainants and defendant to the intervening petition of the appellant herein states: 'The complainants admit that they filed the bill of complaint in this cause as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931' (R. 99). *There is no such function of a federal equity suit in the event of insolvency, legal or equitable, of a private corporation.*"

and at page 47 of such brief, it is stated:

> "We submit that under our system there is and should be no judicial process,—even including a Federal equity suit for the purpose of effectuating a Plan of Reorganization,—by which the stockholders of a corporation can bring about a conversion of its indebtedness for the stockholders' benefit."

This position has been pressed by this petitioner throughout the whole litigation.

This petitioner in its petition for the writ of *certiorari* granted herein stated at page 15 thereof:

> "The courts below in this proceeding, as well as other Federal courts in other similar proceed-

> ings, have shown a tendency to depart from the accepted and usual course of judicial proceedings in that they have allowed themselves to be employed in proceedings designed to bring about the destruction of legal rights rather than the upholding and enforcement thereof, which is and should be their fundamental purpose."

While this petitioner did not formulate it in this way in its brief upon the argument, its whole argument nevertheless was directed to that conclusion. The arbitrary determination of the grossly inadequate upset price, which was discussed fully in Point I of this petitioner's brief, and the approval of the unfair Plan which resulted in the conversion of a part of the creditors' interest in the corporate assets for the benefit of the stockholders, which was argued at length in Point II of the brief, together go to show that the decrees below, which reflected the relief sought in the bill of complaint, went to defeat the legal rights of the creditors rather than to enforce or protect them. It was in line with this argument that this Court said in its opinion at page 10 thereof:

> "The power of the District Court was invoked, not to enforce rights of creditors, but to defeat them."

These words, we believe, set forth in the tersest form the fundamental vice of the decrees below.

While Equity Rule No. 37 prohibits this petitioner from questioning the jurisdiction of the Court, we do not believe that it prohibits it from claiming that the bill lacked equity.

Such a view would seem necessary, at least in respect of suits of this sort. Otherwise a group of creditors or stockholders could bring a Federal equity suit of this nature to effectuate an utterly unfair plan of reorganization, with the inevitable result that the non-assenting creditors whose rights are being violated would be without legal redress. This would be so for the reason that, by intervening in order to protect themselves from the violation of their rights through the accomplishment of the unfair plan, they would by virtue of Rule 37 at that moment become prohibited from criticizing it. Such a rule of procedure would be intolerable.

(6) The strangeness and unfairness of the result is again emphasized by the relief granted to the petitioner Clapier in No. 65. She was, it would seem in effect, granted a lien for the amount of her debentures in full although she merely brought a separate suit, the bill of complaint in which this Court has held was properly dismissed.

At page 13 the opinion states as follows:

> "The dismissal of the Clapier suit was, therefore, proper. But that decree should have been without prejudice to her right to prosecute her claim against the Corporation, the assets in the hands of the receivers and the new company. To this end she should be given leave *to intervene in the receivership suit* and there present her claim for such relief as may appear to be appropriate."

But if, as the Court suggests, Clapier should "intervene in the receivership suit," she would find herself in the same position as this petitioner.

(7) It is fair to surmise that but for the appeal of this petitioner from the two decrees, no phase of the case would ever have become the subject of determination in this Court. This petitioner had the clear status of a party to the record which entitled it to maintain the appeal and, perhaps, without such a party, the others who did not have such a clear status would not alone have been permitted to be heard.

(8) Notwithstanding any attendant difficulties against it which can arise from the effect of Equity Rule No. 37, this petitioner is entitled to a lien for the full amount of its claim. The Plan was unfair and the stockholders were in the position of insolvent debtors who cannot reserve an interest as against their creditors.

While this Court awarded to this petitioner the relief which the Court stated this petitioner sought, the Court clearly was acting under a misapprehension as to what the position of this petitioner has been throughout the litigation.

It seems strange and unfair that the other petitioning debenture holders, especially in view of the whole history of the litigation, should have been treated more favorably than this petitioner. Actually they and this petitioner occupy the same position, that of debenture holders, and, in a realistic view, it is hard to see how this petitioner should be regarded as entitled to less favorable treatment than the others.

WHEREFORE upon the foregoing grounds it is respectfully prayed that this petition for a rehearing be

granted and that the decision herein be modified so that this petitioner be awarded the relief prayed for in the "Conclusion" to its brief quoted at pages 2 and 3 hereof.

Respectfully submitted,

FIRST NATIONAL BANK OF CINCINNATI

By RALPH ROYALL
MANFRED W. EHRICH
SIDNEY J. WATTS
Counsel for Petitioner.

I, RALPH ROYALL, counsel for the above named FIRST NATIONAL BANK OF CINCINNATI, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Ralph Royall

Counsel for Petitioner First National Bank of Cincinnati.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 964

AMY ARZT and JOSEPHINE RAMSEY,

Petitioners
(Appellants Below),

vs.

RUDOLPH B. FLERSHEM, et al., as Reorganization Committee, etc., BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION, Delaware, NATIONAL RADIATOR CORPORATION, Maryland, ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers, etc., and CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents
(Appellees Below),

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER COMPANY and EDWARD J. RAMSEY,

Respondents
(Appellants Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

DAVID M. PALLEY,
of New York, N. Y.

CHARLES H. SACHS,
of Pittsburgh, Pa.,
of Counsel.

GALLO & ACKERMAN, Inc., 143 Liberty Street, Telephone—Rector 2-5856-7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

AMY ARZT, and JOSEPHINE RAMSEY,

Petitioners
(Appellants Below),

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement, dated February 11, 1931, for the Reorganization of National Radiator Corporation, BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION, Delaware, NATIONAL RADIATOR CORPORATION, Maryland, ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers of National Radiator Corporation, Delaware, and CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents
(Appellees Below),

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER COMPANY and EDWARD J. RAMSEY,

Respondents
(Appellants Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable CHARLES E. HUGHES, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

AMY ARZT and JOSEPHINE RAMSEY respectfully pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Third Circuit, entered on March 24th, 1933, affirming the decree of the United States District Court for the Western District of Pennsylvania, dated September 8th, 1932, made by Judge Gibson, confirming the sale of the assets, property and business of said corporation made by Robert S. Waters and William G. Heiner, as receivers of National Radiator Corporation, directing the receivers to deliver to the purchaser of the property a deed thereto, and approving the Plan of Reorganization of the Reorganization Committee.

Statement.

On October 5th, 1931 (R., 10), the respondents, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement, dated February 11, 1931, for the Reorganization of National Radiator Corporation, filed a bill of complaint against the National Radiator Corporation in which they prayed (R., 18-21) for the appointment of receivers of said corporation, the sale of its assets and the distribution of the proceeds. On October 9th, 1931 (R., 93), the National Radiator Corporation appeared in the cause, admitted the allegations of the complaint and joined in the prayer for relief, and the court appointed Robert S. Waters and William G. Heiner receivers (R., 95).

The action was not brought on the ground that the corporation was insolvent or in imminence of insolvency.

Although the bill declares that intervention by the court was necessary to prevent "a multiplicity of suits, a race of diligence, wasteful strife and controversy" (R., 17), the fact is that on October 5th, 1931, the company was solvent and amply able to pay *in full, in cash,* every debt it owed, including the interest, but not the principal upon its outstanding debentures which, however, were not payable before August 1st, 1947. The jurisdiction was invoked solely for the purpose of effectuating a reorganization of the company in order to scale its funded debt and to coerce non-assenting debentureholders into subjection to the plan or else to wipe them out.

On August 8th, 1932 (R., 545), the cash, property and business, including the good-will of the company as a going concern (R., 439), were, pursuant to decree of the court (R., 420-485), sold for the sum of $2,550,000.00 (R., 555), the purchase being made in behalf of the Reorganization Committee under the Reorganization Plan (R., 548).

The petitioners, who jointly hold $121,000.00 principal amount of the company's debentures, were not parties to the cause, but on the 18th day of August, 1932, at a hearing set therefor, they appeared specially and opposed the confirmation of the sale on the ground that the court had never acquired jurisdiction over the subject-matter of the cause and therefore was without power to order the sale or to confirm it (R., 579; 582; 722-732).

The National Radiator Corporation, a Delaware corporation (R., 10), was engaged in the business of manufacturing and selling heating appliances, boilers and radiators (R., 15).

It was formed in August of 1927 by the merger of six companies (R., 49) and on December 31st, 1930, it had outstanding 58,646 shares of $7.00 cumulative preferred stock of no par value, and 272,708 shares of common stock, also of no par value, which, on that day, were carried on its books at $8,134,643.01 (R., 52).

On or about August 30th, 1927, the company authorized an issue of $16,000,000.00 principal amount, 6½% Sinking Fund Gold Debentures (R., 11), and pursuant to that authority, there was issued $12,000,000.00 of said debentures (R., 12), which, on October 5th, 1931, had been reduced to $10,673,000.00 (R., 164). The debentures mature on August 1st, 1947, and provide for the payment, in the interim, of interest semi-annually on the first days of February and August in each year, at the rate of 6½% per annum. The terms and provisions governing their issue and the appurtenant interest coupons, as well as the rights and remedies of the holders of debentures, are set forth in an Indenture, Schedule A annexed to the original bill (R., 23), made between the company and the Bankers Trust Company, a New York corporation, as Trustee (R., 11-12).

The merger was sponsored by the Bankers Trust Company and J. & W. Seligman & Company, New York bankers, who, in conjunction therewith, underwrote the debentures and sold them to the public (R., 372; 399-415).

On February 1st, 1931, the National Radiator Corporation refused to pay the installment of interest which then became due upon the debentures of which there were then outstanding $10,716,000.00 principal amount (R., 49; 52).

In the latter part of 1930, John H. Waters, President and Chairman of the Board of Directors, and Rudolph B. Flershem, Chairman of the Executive Committee, had decided upon a reorganization of the company in order to scale its funded debt. Thereupon, after consultation with the Bankers Trust Company and J. & W. Seligman & Company, Waters and Flershem appointed themselves and one Charles O. Cornell, a Reorganization Committee, and with the approval of the Bankers Trust Company, the Trustee of the debentures, decided as part of the plan to reorganize, not to pay the install-

ment of interest which would become due, upon the outstanding debentures, on February 1st, 1931 (R., 372; 623-624; 748-749).

On January 31st, 1931, the Board of Directors ratified the action of Waters and Flershem. The Board of Directors agreed with its Chairman (R., 748):

> "* * * that, although the cash working capital of the Company as shown by the balance sheet was reasonably ample, it was evident that, if the Company were to do an increasing volume of business, it would require the use of all or a substantial part of this cash to carry larger inventories and receivables, and that it would also be necessary to make large expenditures for the design of new products and for equipment necessary in their manufacture. Otherwise, the Chairman pointed out it might well prove to be impossible to maintain the Company's competitive business as against other enterprises in the industry. * * * "

There was submitted to the Board at said meeting a financial statement of the company as of December 31st, 1930, just one month before. A copy of the statement is contained in the Plan and Agreement annexed as Exhibit B to the bill of complaint (R., 49-92). That statement (R., 51-52) discloses that the net worth of the company on December 31st, 1930, was $8,134,643.01—its assets were $19,434,548.08, and its liabilities, including the outstanding debentures, $11,299,905.07. Especially noteworthy and impressive is the statement of its current assets and its current liabilities. On December 31st, 1930, the quick current assets of the National Radiator Corporation were $5,054.007.30 *and $1,701,899.94 of that was cash.* And its current liabilities at that time were only $491,895.72 (only $46,787.60 was presently due) and included therein was $293,339.58 accrued interest upon the outstanding debentures, computed to December 31st, 1930.

The ratio of cash to current liabilities was 3½ to 1, and of current assets to current liabilities was more than 10 to 1.

On February 1st, 1931, another month's interest, amounting to $53,580.00 on the debentures, had accrued and the current liabilities were thereby increased to $545,475.72. But it is indubitably apparent that on February 1st, 1931, the company could have paid all its current and maturing debts, including the interest on its outstanding debentures, out of the cash alone and there would still have remained in cash about $1,200,000.00, and none of the other current assets would have been affected. The company was manifestly solvent and liquid and its refusal to pay the interest upon its outstanding debentures was unconscionable.

On February 11th, the Reorganization Committee promulgated a plan of reorganization and appointed the Bankers Trust Company depositary under the plan (R., 70).

The plan is all in the interest of the company, discriminates between debentureholders and other creditors of equal rank, contains no provision for any new capital and makes no provision for non-assenting debentureholders.

The plan contemplates the organization of a new company to which is to be transferred all the assets of the old corporation, including the cash (R., 55). The capital structure of the new corporation is to be as follows (R., 56):

	Authorized	*To Be Presently Outstanding*
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares	272,966 shares

The new debentures bear interest at the rate of 5% per annum which, however, is payable only out of income (R., 56).

The plan proposes to give to each holder of $1,000.00 principal amount of old debentures $500.00 principal amount of new debentures, 5 shares of new preferred stock and 20 shares of new common stock (R., 60-61).

Merchandise and service creditors are to be paid in full by the new company, unless they shall have previously been paid by the old company (R., 56).

The holders of the present preferred stock are to receive, share for share, common stock of the new corporation. Holders of the present common stock are to receive stock warrants of the new company in the ratio of 1 to 3, namely, one stock warrant of the new company for each three shares of common stock of the old company, upon payment, to the Reorganization Committee, of $1.00 for each warrant issued (R., 61). The holders of the warrants are entitled to purchase, on or before July 1st, 1941, shares of common stock in the new company upon payment of $20.00 per share (R., 60).

There is no provision for any assessment upon the preferred stockholders and the holders of stock warrants have until the 1st day of July, 1941, to decide whether to exercise their options or not.

Although the preferred stock is issued without par value, the holders of such stock upon involuntary liquidation are entitled to $100.00 a share, and on voluntary liquidation to $115.00 a share, thus placing the value of $100.00 a share upon said stock (R., 58-59).

The common stock is also without par value but the value placed on that stock in the scheme of reorganization is $20.00 per share, the price at which it may be purchased, by the holders of warrants, on or before July 1st, 1941 (R., 60).

Giving effect, therefore, to the values placed on the securities to be issued, the capital of the reorganized corporation is $16,175,320.00, which is made up as follows:

Bonds 15-Year 5% Debentures	$5,358,000.00
$7 Preferred stock no par value at $100.00 per share	5,358,000.00
272,966 shares at $20.00	5,459,320.00
Total	$16,175,320.00

The plan met with opposition. A committee known as the Bondholders' Protective Committee, purporting to represent debentureholders, was formed (R., 569-574; 752). And of that committee, Frank B. Cahn, one of the complainants and who later became a member of the Reorganization Committee, was a member (R., 574; 753). That committee condemned the management of the company, denounced the plan and advised debentureholders not to deposit thereunder but urged debentureholders to aid in their opposition to the plan by depositing their debentures with them. There was deposited with that committee in excess of $851,000.00 principal amount of debentures of holders who were opposed to the plan (R., 753).

On September 15th, 1931, the two committees arranged a settlement between themselves (R., 752-763). The Bondholders' Protective Committee agreed to deposit, under the Reorganization Plan, the debentures deposited with them (R., 758), and the Reorganization Committee agreed to allow the Bondholders' Protective Committee $35,000.00 for compensation, counsel fees and expenses of that committee (R., 759); to elect one of the Bondholders' Protective Committee to the Reorganization Committee (R., 761); and to make one of that committee a member of the Board of the new company (R., 761).

On September 17th, 1931, Frank B. Cahn, a member

of the Bondholders' Protective Committee, was, pursuant to the terms of the settlement, elected a member of the Reorganization Committee (R., 766).

On September 15th, 1931, the Reorganization Committee declared the plan operative. More than 81% of debentures had been deposited under the plan but there were still 19% who had not assented thereto (R., 535).

The Indenture provides that in the event of a sale by the company of its property as an entirety, the obligations of the debentures shall be assumed by the purchaser (R., 45-47). It is therefore obvious that unless the new company was willing to assume the obligations of the debentures held by non-assenting debentureholders, it was necessary to find a means for transferring the property of the National Radiator Corporation to a new company, free from those obligations.

On August 1st, 1931, the company had also refused to pay the installment of interest which then became due upon its outstanding debentures.

A large number of debentureholders refused to assent to the plan, demanded payment of their interest and, when such payment was refused, some brought suit (R., 767). Thereupon, the Reorganization Committee, two of whose four members are officers and directors of the company, decided to file the bill of complaint and, in accordance with that decision, the bill was filed and the National Radiator Corporation appeared and consented to the decree which was entered. Robert S. Waters, Vice-President and General Manager of National Radiator Corporation (R., 206), and a son (R., 237) of John H. Waters, its President, Chairman of its Board of Directors and a member of the Reorganization Committee, and William G. Heiner, an attorney, were appointed receivers of that company (R., 96).

The bill was filed "not only to forward the purposes of the Reorganization Plan but also to prevent a multiplicity of suits against National Radiator Corporation

with consequent wasteful strife and controversy" (R., 767). The expressed and avowed purpose of the suit was to defeat non-assenting debentureholders of their rights and to accomplish the transfer of the corporation's property to a new corporation, free from the obligations to them.

On October 5th, 1931, the company was solvent and able to pay all its obligations then due and payable—*in cash, in full.* The company was both solvent and liquid.

A statement of the company's assets on October 8th, 1931, is contained in the Record at page 781.

The assets are valued at	$11,944,244.38
This does not include Good-will, Trade Marks and Patents (R., 782)	6,634,501.90
which would make the total assets	$18,578.746.28

But what is especially interesting is the statement of current assets. A summary of those assets is as follows (R., 781):

Cash		$1,257,381.59
Notes and Accounts Receivable	$1,673,373.59	
Less Reserve for Bad Debts and Doubtful Notes and Accounts Receivable	179,046.37	1,494,327.22
Inventory		2,048,901.97
Stocks and Bonds		104,582.36
Life Insurance Policies (Cash Surrender Value)		18,984.00
New York State Highway Bonds		15,550.40
Total		$4,939,727.54

The statement does not set forth the liabilities, but the Decree does (R., 435-436). Besides the $10,673,000.00 outstanding debentures which were not payable before August 1st, 1947, the liabilities were:

Past Due Interest on Debentures (R., 435)	$709,395.69
Other Debts (R., 436)	157,511.89
Total	$866,907.58

The company on October 5th, 1931, could have paid all its current debts, including the overdue interest upon the debentures out of the cash alone and there would still have remained in cash $400,000.00, and none of the other current assets would have been affected.

Almost the very first official act of the Receivers was to disavow the statements of the bill and the findings of the District Court. The complaint alleged (R., 16) and the court found that the National Radiator Corporation is (R., 95) "presently unable to meet and discharge its obligations which have already matured without seriously jeopardizing the ability * * * to continue in business * * *".

On October 23rd, 1931, two weeks after their appointment, the Receivers procured an order (R., 779-780), authorizing them to invest "such amount or amounts of cash of the receivership estate as, in the judgment of the Receivers, is not needed at the time for expenses and working capital; * * *".

And thereupon the Receivers proceeded to invest, and kept invested, $1,030,000.00 of the company's cash (R., 381-382),—

$980,000.00 in United States Treasury Certificates of Indebtedness, and

$50,000.00 in Bank Certificates of Deposit.

One million thirty thousand ($1,030,000.00) Dollars—more than was necessary to pay the overdue interest on

the debentures and the other debts of the company—the Receivers invested in government and bank certificates because it was not needed in the conduct of the business.

In furtherance of the reorganization plan, and to forestall further action by non-assenting debentureholders (R., 767), the Bankers Trust Company, as Trustee, at the request of the Reorganization Committee (R., 169; 67-68), on October 13th instituted suit and recovered judgment against the National Radiator Corporation in the District Court, for the February 1st and August 1st installments of interest upon the outstanding debentures (R., 786). As part of the procedure followed in bringing to a sale the properties and assets of the National Radiator Corporation, and in consummating its reorganization (R., 773), the Bankers Trust Company, as Trustee, also at the request of the Reorganization Committee (R., 170-173; 775), declared immediately due and payable (because of the default in the payment of interest) the principal of the outstanding debentures and, after demand upon and refusal by the National Radiator Corporation to pay the same, instituted suit and recovered judgment therefor in the District Court on December 30th, 1931 (R., 788-789). Thereafter, on January 9th, 1932, in conformity with the procedure adopted by the Reorganization Committee and at its request (R., 775), the Bankers Trust Company, as Trustee, intervened in the cause as a party plaintiff and in its petition of intervention, adopted all of the allegations of the bill and joined in its prayer for relief (R., 128-138).

The complainants were now ready for a sale and in March, 1932, the court heard testimony for the purpose of fixing the upset price.

No notice of the hearings was given to any non-assenting creditors and, with the exception of the intervener, First National Bank of Cincinnati, none took part in those hearings.

Nor did the District Court order an appraisal to be made by independent and impartial experts. In fixing the upset price, the District Court relied upon the notions of Robert S. Waters (R., 206-333; 359-369), one of the receivers, Vice-President and General Manager of the company and a son of John H. Waters (R., 370-378), President and Chairman of the Board of that company and a member of the Reorganization Committee; of Rudolph B. Flershem (R., 333-358), Chairman of the Executive Committee of the company and also a member of the Reorganization Committee; of John H. Waters; and of William G. Heiner (R., 379-395), the other receiver, an attorney at law who, previous to his appointment, never had any experience whatever in the radiator or boiler business. They testified it would be possible to realize for all the assets of the company, including almost $2,000,000.00 of cash, at most $2,300,000.00 (R., 232; 339-340; 343; 383). They based their opinions upon the financial condition of the company as of December 31st, 1931. The assets at that time were as follows (R., 381-382):

Cash	$852,096.29
United States Certificates of Indebtedness	980,000.00
Interest on United States Certificates	6,124.97
Bank Certificates of Deposit	50,000.00
Cash Surrender Value of Life Insurance	22,900.00
Deposit New York Workmen's Compensation Law	18,686.33
Total Cash Assets	$1,929,807.59
Accounts Receivable (less reserve for bad debts, etc. [R., 359])	858,992.41
Inventory	1,634,905.25
Total Current Assets	$4,523,705.25

Besides those assets, there were plants, machinery, patents, good-will, trade marks, patterns and investments in affiliated companies, which were carried on the books of the company at $13,000,000.00 (R., 782) and which, in 1927 when the merger was formed and the debentures sold, were appraised at upwards of $16,000,000.00 (R., 406). Eighteen million dollars of assets were, in their opinion, worth a paltry $400,000.00 over and above the almost $2,000,000.00 of cash on hand. They explained that the difference between the book value and their opinions represented the difference between liquidation and a going concern (R., 222-223; 225-226; 232-233; 328-329; 331; 338-339; 343-344; 346-347; 348-349; 373).

On May 31, 1932, the court ordered sold all property and interests in property of every kind, character and description, including all the business, good-will, corporate name, patents, trade marks, trade names, bills and accounts receivable, choses in action and *cash on hand or in bank* (R., 439), and fixed the upset price therefor at $2,500,000.00 (R., 481). On August 8th, 1932, the Reorganization Committee purchased the business and assets of the corporation as a going concern for the sum of $2,550,000.00 (R., 544-556).

The Circuit Court of Appeals in its opinion, per Woolley, C. J., said:

> "* * * It is pertinent to note the bill did not say the corporation was insolvent. That, in effect, was a tacit admission or declaration of its solvency. The corporation, by its answer, admitted the truth of all allegations of the bill.
>
> "Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. * * *"

The Questions Presented.

1. Did the Circuit Court of Appeals rightly decide that the District Court had jurisdiction over the subject matter of the cause?

2. May a Federal court of equity take jurisdiction of a corporation which is solvent and able to pay in full, in cash, its debts presently due and payable, for the sole purpose of reorganizing it?

3. May a Federal court of equity take jurisdiction and appoint receivers of a corporation which is solvent and able to pay and discharge in full, in cash, all its debts then due and maturing, merely because of the possibility that in the future, the corporation may be unable to meet the debts which would then become due?

4. May a Federal court of equity take jurisdiction and appoint receivers of a corporation which is solvent and able to pay and discharge in full, in cash, all its debts then due and maturing, merely because the Board of Directors decides that it is desirable to reorganize it in order to scale its funded debt?

5. If in the case of a corporation as above described, jurisdiction did not exist *ab initio*, may jurisdiction nevertheless be retained merely because subsequently through the collusive default in the payment of the interest upon the funded debt, the corporation may have been rendered insolvent or in imminence of insolvency?

Reasons Relied on for the Allowance of a Writ.

A.

The exercise of jurisdiction in this cause is wholly without precedent and marks a departure from the ac-

cepted principle of law governing equity receiverships. It permits a going corporation, which is solvent and amply able to meet and discharge its debts due and maturing, to evade its just obligations.

B.

The exercise of jurisdiction in this cause carries to the extreme the abuses so strongly condemned by this Court in Harkin vs. Brundage, 276 U. S., 36; Michigan vs. Michigan Trust Co., 286 U. S., 334; and Shapiro vs. Wilgus, 287 U. S., 348.

C.

The exercise of jurisdiction in this cause violates the fundamental rules of property and rights of creditors and constitutes a taking of property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

Importance and Novelty of the Questions.

The questions involved in this cause are novel and in importance transcend the private interests of the petitioners. This Court has thrice warned against the perversion of the function of receivership and its use for the purpose of hindering and delaying creditors in the enforcement of their rights.

The legitimate functions of the remedy and the uses and extent to which it may be employed have never been definitely delimited by this Court. There is no doubt that the doctrine in this case, unless reversed, will be widely applied and will be used as a precedent for the right of corporations to reorganize in order to scale their funded debts when, in the discretion of the board of directors, such a course is advisable.

The present case and the case of "Lily Clapier vs. Flershem, et al.," in which a petition for a writ of certiorari is being presented to this Court simultaneously herewith, place before this Court for the first time the whole subject of equity receiverships and their legitimate function.

We respectfully submit that it is of public importance that this Court should authoritatively and definitely define the uses, functions and limits of that remedy.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit, should be granted.

AMY ARZT,
JOSEPHINE RAMSEY.

DAVID M. PALLEY,
of New York, N. Y.

CHARLES H. SACHS,
of Pittsburgh, Pa.,
of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1932.

No.

AMY ARZT and JOSEPHINE RAMSEY,

Petitioners
(Appellants Below),

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement, dated February 11, 1931, for the Reorganization of National Radiator Corporation, BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION, Delaware, NATIONAL RADIATOR CORPORATION, Maryland, ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers of National Radiator Corporation, Delaware, and CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents
(Appellees Below),

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER COMPANY and EDWARD J. RAMSEY,

Respondents
(Appellants Below).

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported; the opinions of

Judge Gibson appear at pages 416 and 691 of the record but have not been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered in the office of the Clerk of the Circuit Court for the Third Circuit on March 24th, 1933.

Jurisdiction to issue the writ is found in the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13th, 1925.

Statement of Facts.

The principal facts are stated in the foregoing petition.

Specifications of Error.

1. The Circuit Court of Appeals erred in affirming all orders and decrees of the District Court appealed from.

2. The Circuit Court of Appeals erred in not reversing the decrees of the District Court, dated October 9th, 1931, May 31st, 1932 and September 8th, 1932, as to the petitioners and all other creditors who did not assent to the plan of reorganization.

3. The Circuit Court of Appeals erred in holding that jurisdiction over the subject matter of the cause existed and was properly exercised.

4. The Circuit Court of Appeals erred in holding that the exercise of jurisdiction in this cause did not constitute a taking of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

Argument.

I.

The exercise of jurisdiction in this cause marks a departure from the accepted principles of law governing equity receiverships; violates the fundamental rules of property and rights of creditors; and constitutes a taking of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

It is a fundamental principle of our jurisprudence that the property of a debtor should be applied to the payment of his debts. To that end our courts—law and equity—are invested with power to sell the property of an unwilling debtor and to distribute the proceeds to his creditors; but payment may not be demanded nor the power invoked before the debt is due.

The creditor has not the right of selection and if the property available to legal process be sufficient to discharge the debt, no appeal to equity lies. The appeal, whether to law or equity, is for the enforcement of payment through the power of sale and distribution.

Equity, however, will not exercise its jurisdiction except where the legal remedy is inadequate.

The assets of an insolvent corporation are deemed held in trust for the benefit of its creditors and equity will take jurisdiction to administer that trust. This trust doctrine has been extended also to corporations in imminence of insolvency; corporations which though solvent would be rendered insolvent if all creditors with debts presently due and maturing should insist upon immediate payment.

Jurisdiction, however, depends upon the right to enforce payment through its power of sale and distribution. It is distinctly a creditors' remedy for the enforcement of creditors' rights. The reason underlying

its exercise is the rule of distribution rateably amongst creditors of the corporation.

Receivership is an ancillary remedy granted—pending sale—to prevent the acquisition of priority and preference in such distribution.

Reorganization is but an incident of the exercise of that power. It is a combination of persons with similar interests and whose interests are equitably adjusted to purchase the property at the sale and to use such property after purchase to their mutual advantage. The raison d'etre of the remedy, however, is the enforcement of payment and not reorganization.

It is therefore essential to the exercise of jurisdiction that the corporation be insolvent or be in imminence of insolvency; that it have debts presently due and payable but which it is unable to pay. The mere refusal to pay does not confer jurisdiction upon the court; there must be debts now due and the inability to pay them.

That essential element is manifestly lacking in this case. The power of sale and distribution was usurped for the purpose of hindering and delaying creditors and absolving the corporation from debts not yet due and not maturing until 1947. Reorganization was the primary relief sought and the power of sale was the means adopted for its accomplishment. Jurisdiction was assumed and retained not because of present insolvency through inability to pay debts presently due and maturing, but because of possible future insolvency through the possible inability in the future to pay debts which would then mature. Such a doctrine substitutes conjecture for accepted principles of law. It is without precedent.

If possible future inability to pay debts not yet due can be laid as a basis for the use of the power of sale and distribution, then such rule should be available to the creditors as well as the debtor. Clearly, over the objection of the National Radiator Corporation which was able

to pay its debts present and maturing in full, in cash, such a right would not be allowed.

Jurisdiction cannot be conferred by consent, nor can a debtor by collusion with a friendly creditor and an obliging trustee effect a transfer of its assets and a commutation of its debts. The granting of a remedy where no right thereto exists constitutes a denial of due process of law to those who are prejudiced thereby.

Because in the proper case a reorganization may result from the assumption of jurisdiction by a court of equity does not justify the exercise of jurisdiction where the basic essential elements do not exist.

Conclusion.

It is important that the questions and principles governing equity receiverships be authoritatively settled by this court.

Respectfully submitted,

DAVID M. PALLEY,
of New York, N. Y.

CHARLES H. SACHS,
of Pittsburgh, Pa.,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 64.

AMY ARZT and JOSEPHINE RAMSEY,
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITIONERS' BRIEF.

DAVID M. PALLEY,
of New York, N. Y.,

CHARLES H. SACHS,
LOUIS CAPLAN,
of Pittsburgh, Pa.,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 64.

AMY ARZT and JOSEPHINE RAMSEY,
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITIONERS' BRIEF.

This case comes to this Court on a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Third Circuit, entered on March 24th, 1933, affirming a decree of the United States District Court for the Western District of Pennsylvania, dated September 8th, 1932, made by Judge Gibson confirming the sale, by receivers, of the assets, property and business of the National Radiator Corporation, a Delaware corporation, directing the receivers to deliver to the purchaser a deed thereto and approving the plan of reorganization of the company.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 64 F. (2d) 847. The opinions of Judge Gibson are not reported but appear in the record at pages 280 and 463.

Jurisdiction.

The decree of the United States Circuit Court of Appeals was entered in the office of the Clerk of the United States Circuit Court of Appeals for the Third Circuit on March 24th, 1933 (R., 547).

Jurisdiction to review this case is found in the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. 347.

Statement of the Case.

The petitioners challenge the jurisdiction of the District Court in this case and impugn its right to appoint receivers, sell the assets and approve the plan of reorganization of the respondent, National Radiator Corporation (Del.).

On October 5th, 1931 (R., 6), the respondents, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement, dated February 11, 1931, for the Reorganization of National Radiator Corporation, filed, in the District Court of the United States for the Western District of Pennsylvania, a bill of complaint against the National Radiator Corporation in which they prayed (R., 12-14) for the appointment of receivers of said corporation, the sale of its assets and the distribution of the proceeds. On October 9th,

1931 (R., 63), the National Radiator Corporation appeared in the cause, admitted the allegations of the complaint and joined in the prayer for relief, and the court appointed Robert S. Waters and William G. Heiner receivers (R., 65).

The action was not brought on the ground that the corporation was insolvent or in imminence of insolvency.

Although the bill declares that intervention by the court was necessary to prevent "a multiplicity of suits, a race of diligence, wasteful strife and controversy" (R., 11), the fact is that on October 5th, 1931, the company was solvent and amply able to pay *in full, in cash*, every debt as it matured in regular course.

The jurisdiction was invoked solely for the purpose of effectuating a reorganization of the company in order to scale its funded debt and to coerce non-assenting debentureholders into subjection to the plan or else to wipe them out.

On August 8th, 1932 (R., 372), the cash, property and business, including the good-will of the company as a going concern (R., 297), were, pursuant to decree of the District Court (R., 283-329), sold for the sum of $2,550,000.00 (R., 375), the purchase being made in behalf of the Reorganization Committee under the Reorganization Plan (R., 370).

The petitioners, who jointly hold $121,000.00 (R., 483; 487) principal amount of the company's debentures, were not parties to the cause, but on the 18th day of August, 1932 (R., 389), at a hearing set therefor (R., 299), they appeared specially and opposed the confirmation of the sale on the ground that the court had never acquired jurisdiction over the subject-matter of the cause and therefore was without power to order the sale or to confirm it (R., 483; 486). The District Court overruled the objection, confirmed the sale and approved the plan of reorganization (R., 463); the Circuit Court of

Appeals affirmed the decree of the District Court (R., 545; 547).

The National Radiator Corporation (Del.) (R., 7), was engaged in the business of manufacturing and selling heating appliances, boilers and radiators (R., 10).

It was formed in August of 1927, by the merger of six companies (R., 33; 275), with assets valued at upwards of $26,000,000.00 (R., 274) and with a capital stock and surplus of $12,714,200.00, consisting of 60,000 shares of $7.00 cumulative preferred stock of no par value, and 270,000 shares of common stock also of no par value (R., 274).

In connection with this merger, the company on August 30th, 1927, authorized an issue of $16,000,000.00 principal amount, 6½% Sinking Fund Gold Debentures (R., 7; 106), and pursuant to that authority, there was issued $12,000,000.00 of said debentures (R., 8; 106). *The debentures were payable on August 1st, 1947,* and provided for the payment of interest, semi-annually, on the first days of February and August in each year, at the rate of 6½% per annum (R., 16). The terms and provisions governing their issue and the appurtenant interest coupons, as well as the rights and remedies of the holders of debentures, are set forth in an Indenture (R., 15-32) (Schedule A annexed to the Bill [R., 15]), made between the company and the Bankers Trust Company, a New York corporation, as Trustee (R., 7-8; 15).

The debentures were underwritten and sold by the Bankers Trust Company and J. & W. Seligman & Company, New York bankers, who jointly sponsored the merger (R., 251; 275).

On February 1st, 1931, the National Radiator Corporation refused to pay the installment of interest which then became due upon the debentures (R., 32-33; 109) of which there were then outstanding $10,716,000.00 principal amount (R., 34).

The refusal to pay the interest was not because of lack of funds.

In the latter part of 1930 (R., 417), John H. Waters, President and Chairman of the Board of Directors, and Rudolph B. Flershem, Chairman of the Executive Committee, had decided upon a reorganization of the company in order to scale its funded debt (R., 35; 251). Thereupon, after consultation with the Bankers Trust Company and J. & W. Seligman & Company (R., 251; 417), Waters and Flershem appointed themselves and one Charles O. Cornell, a Reorganization Committee (R., 251; 500), and with the approval of the Bankers Trust Company, the Trustee of the debentures, decided, as part of the plan to reorganize, not to pay the installment of interest which would become due on February 1st, 1931 (R., 251; 417-418; 500-501).

On January 31st, 1931, the Board of Directors ratified the action of Waters and Flershem. The Board of Directors agreed with its Chairman (R., 500):

> "• • • that, although the cash working capital of the Company as shown by the balance sheet was reasonably ample, it was evident that, if the Company were to do an increasing volume of business, it would require the use of all or a substantial part of this cash to carry larger inventories and receivables, and that it would also be necessary to make large expenditures for the design of new products and for equipment necessary in their manufacture. Otherwise, the Chairman pointed out it might well prove to be impossible to maintain the Company's competitive business as against other enterprises in the industry."

There was submitted to the Board at that meeting a financial statement of the company as of December 31st, 1930, just one month before. A copy of the statement

is contained in the Plan and Agreement (annexed as Exhibit B to the bill of complaint [R., 32-63]). That statement (R., 34-35) discloses that the net worth of the company on December 31st, 1930, was $8,134,643.01—its assets were $19,434,548.08, and its liabilities, including the outstanding debentures, $11,299,905.07.

Especially noteworthy and impressive is the statement of its current assets and its current liabilities. On December 31st, 1930, the quick current assets of the National Radiator Corporation were $5,054,007.30 *and $1,701,899.94 of that was cash.* And its current liabilities at that time were only $491,895.72 (*only $46,787.60 was presently due*) and included therein was $293,339.58 accrued interest upon the outstanding debentures, computed to December 31st, 1930.

The ratio of cash to current liabilities was 3½ to 1, and of current assets to current liabilities was more than 10 to 1.

It is indubitably apparent that on February 1st, 1931, the company could have paid all its current and maturing debts, including the interest on its outstanding debentures, out of the cash alone and there would still have remained in cash about $1,200,000.00, and none of the other current assets would have been affected. The company was manifestly solvent and liquid and its refusal to pay the interest upon its outstanding debentures was unconscionable.

On February 11th, the Reorganization Committee promulgated a plan of reorganization (R., 32) and appointed the Bankers Trust Company, the Trustee of the debentures, depositary under the plan (R., 47; 109). This committee inaugurated by and acting in behalf of the company, purports to represent debentureholders, preferred stockholders and common stockholders (R., 343).

However, the plan is all in the interest of the company, discriminates against debentureholders in favor

of other creditors of equal rank, contains no provision for any new capital and makes no provision for non-assenting debentureholders.

The plan contemplates the organization of a new company to which is to be transferred all the assets of the old corporation including the cash (R., 37). The capital structure of the new corporation is as follows (R., 37):

	Authorized	*To be Presently Outstanding*
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares	272,966 shares

The new debentures bear interest at the rate of 5% per annum which, however, is payable only out of income (R., 38).

The plan gives to each holder of $1,000.00 principal amount of old debentures $500.00 principal amount of new debentures, 5 shares of new preferred stock and 20 shares of new common stock (R., 40-41).

Merchandise and service creditors are to be paid in full by the new company, unless they shall have previously been paid by the old company (R., 37).

The holders of the present preferred stock are to receive, share for share, common stock of the new corporation (R., 41). Holders of the present common stock are to receive stock warrants of the new company in the ratio of 1 to 3, namely, one stock warrant of the new company for each three shares of common stock of the old company, upon payment, *to the Reorganization Committee,* of $1.00 for each warrant issued (R., 41). The holders of the warrants are entitled to purchase, *on or*

before July 1st, 1941, shares of common stock in the new company upon payment of $20.00 per share (R., 40).

There is no provision for any assessment upon the preferred stockholders and the holders of stock warrants have until the 1st day of July, 1941, to decide whether to exercise their options or not.

Although the preferred stock is issued without par value, the holders of such stock upon involuntary liquidation are entitled to $100.00 a share, and on voluntary liquidation to $115.00 a share, thus placing the value of $100.00 a share upon said stock (R., 39-40).

The common stock is also without par value but the valuation placed on that stock in the scheme of reorganization is $20.00 per share, the price at which it may be purchased, by the holders of warrants, on or before July 1st, 1941 (R., 40).

Giving effect, therefore, to the valuations placed on the securities to be issued, the capital of the reorganized corporation is $16,175,320.00, which is made up as follows:

15-Year 5% Debentures	$5,358,000.00
$7 Preferred stock no par value at $100.00 per share	5,358,000.00
272,966 shares at $20.00	5,459,320.00
Total	$16,175,320.00

The plan met with opposition. A committee, known as the Bondholders' Protective Committee, purporting to represent debentureholders only was formed (R., 383-386). And of that committee, Frank B. Cahn, one of the complainants and who later became a member of the Reorganization Committee, was a member (R., 386; 503). That committee unanimously condemned the management of the company as incompetent (R., 386), denounced the plan as unjust to debentureholders and

urged debentureholders not to deposit under the plan but to aid in their opposition to it by depositing their debentures with them. There was deposited with that committee in excess of $851,000.00 principal amount of debentures of holders who were opposed to the plan (R., 503).

On September 15th, 1931, the two committees arranged a settlement between themselves (R., 503-510). The Bondholders' Protective Committee agreed to deposit, under the Reorganization Plan, the debentures deposited with them (R., 507), and the Reorganization Committee agreed to allow the Bondholders' Protective Committee $35,000.00 for compensation, counsel fees and expenses of that committee (R., 508); to elect one of the Bondholders' Protective Committee to the Reorganization Committee (R., 508); and to make one of that committee a member of the Board of the new company (R., 509).

On September 15th, the same day, the Reorganization Committee declared the plan operative (R., 362). About 81% of the outstanding debentures had been deposited with the Reorganization Committee (R., 362) and about 9% with the Bondholders' Protective Committee (R., 366).

On September 17th, 1931, Frank B. Cahn, a member of the Bondholders' Protective Committee, was pursuant to the terms of the settlement, elected a member of the Reorganization Committee (R., 512).

But there were still holders of upwards of $1,000,000.00 principal amount of debentures who had not deposited with either Committee and who refused to assent to the plan of reorganization.

The Indenture provides that in the event of a sale by the company of its property as an entirety, the obligations of the debentures shall be assumed by the purchaser (R., 30-32). It is therefore obvious that unless the new company was willing to assume the obligations of the debentures held by non-assenting debenturehold-

ers, it was necessary to find a means for transferring the property of the National Radiator Corporation to the new company, free from those obligations.

Some of those non-assenting debentureholders insisted upon the payment of the February 1 and August 1, 1931, installments of interest and when payment was refused, brought suit (R., 512). Thereupon, on October 1st, 1931, the Reorganization Committee, two of whose four members were officers and directors of the National Radiator Corporation, met and agreed upon the course of action to "be pursued not only to forward the purposes of the Reorganization Plan but also to prevent a multiplicity of suits against National Radiator Corporation" (R., 513).

The avowed purpose was to prevent non-assenting debentureholders from collecting their interest and either to force them into the plan or else to wipe them out. It was therefore decided that the Bankers Trust Company as depositary should demand the payment of interest upon the deposited debentures and upon refusal, a bill of complaint should be filed by the Reorganization Committee against the National Radiator Corporation (Del.) in the District Court of the United States for the Western District of Pennsylvania, praying for the sale of the assets and the appointment of receivers (R., 513-514).

That was done.

On October 2nd, 1931 (R., 110; 525), the Bankers Trust Company as depositary wrote a letter to itself as paying agent, demanding the payment of the interest, and then notified (R., 511) the Committee that payment was refused for the reason that there were no funds on deposit with it, as paying agent, with which to make such payment (R., 110). Thereupon, on October 5th, 1931 (R., 6), the bill was filed and on October 9th, 1931 (R., 63), the National Radiator Corporation appeared, consented to the decree which was entered, and William G. Heiner, an attorney, and Robert S. Waters, Vice-President and General Manager of the

National Radiator Corporation and a son of John H. Waters, its President and Chairman of its Board of Directors and a member of its Reorganization Committee, were appointed receivers of that company (R., 65).

An analysis of the bill which was filed is contained in our brief in the companion case of *Clapier* v. *Flershem, et al.*, No. 65.

At the October 1st meeting (R., 512), it was also decided that the Bankers Trust Company as Trustee should, after demand and refusal, sue and recover judgment for the February 1st and August 1st, 1931, installments of interest upon all the outstanding debentures (R., 513). Accordingly, on October 9th, 1931 (R., 111), the Bankers Trust Company as Trustee demanded the interest and upon refusal, it did, on October 13th, 1931, institute suit and recover judgment for $713,944.38 (R., 526).

A reading of the Indenture will make the reason for that demand and suit quite plain. The debentures and appurtenant coupons contain the provision that the rights of the holders are subject to the terms and provisions of the Indenture (R., 17), and the Indenture contains the following provision (Article V, Section 9, R., 30):

> "All rights of action under this Indenture, or under any of the debentures or coupons, may be enforced by the Trustee without the possession of any of the debentures or coupons or the production thereof on any trial or other proceeding relative thereto, and any such suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery of judgment shall be for the ratable benefit of the holders and registered owners of all of the debentures and coupons, except as provided in Section 2 of Article IV hereof, and Section 1 of this Article."

The purpose of the suit and recovery of judgment by the Bankers Trust Company was to enable the National

Radiator Corporation to plead that judgment as a bar to suits for interest by non-assenting debentureholders (R., 420-421).

That very defense was interposed and upheld in a suit brought by one Rae Berger against the National Radiator Corporation in the City Court of the City of New York, County of New York (R., 420).

On October 5th, 1931, the company was solvent and able to pay all its obligations then due and payable—*in cash, in full.* The company was both solvent and liquid.

A statement of the company's assets on October 8th, 1931, is contained in the Record at page 521:

The assets are valued at	$11,944,244.38
This does not include Good-will, Trade Marks and Patents (R., 523)	6,634,501.90
which would make the total assets	$18,578,746.28

But what is especially interesting and noteworthy is the statement of current assets. A summary of those assets is as follows (R., 521-522):

Cash		$1,257,381.59
Notes and Accounts Receivable	$1,673,373.59	
Less Reserve for Bad Debts and Doubtful Notes and Accounts Receivable	179,046.37	1,494,327.22
Inventory		2,048,901.97
Stocks and Bonds		104,582.36
Life Insurance Policies (Cash Surrender Value)		18,984.00
New York State Highway Bonds		15,550.40
Total		$4,939,727.54

The statement does not set forth the liabilities, but the Decree does (R., 294). Besides the $10,673,000.00 (R., 108) outstanding debentures which were not payable before August 1st, 1947, the liabilities were:

Past Due Interest on Debentures (R., 294)		$709,395.69
Other Debts (R., 295)		157,511.89
Total		$866,907.58
In addition there was due August 1, 1931 (R., 108) a Sinking Fund payment of	$201,918.50	
Against which the company surrendered bonds in the aggregate principal amount of $158,000.00 (R., 108), for which it was entitled to a credit at the redemption price (R., 279) of 107½ (R., 18), i. e.	169,850.00	
Leaving due on account of Sinking Fund payment		32,068.50
Making the total debts due on October 5, 1931		$899,076.08

It is manifest that the company on October 5th, 1931, could have paid all its current debts, including the overdue interest upon all the debentures, out of the cash alone and there would still have remained, *in cash*, almost $400,000.00, and none of the other current assets would have been affected.

Almost the very first official act of the Receivers, after they assumed the operation of the business of the company, was to disavow the statements of the bill and the findings of the District Court. The complaint alleged (R., 11) and the court found that the National Radiator Corporation is (R., 65) "presently unable to meet and discharge its obligations which have already matured, without seriously jeopardizing the ability * * * to continue in business".

On October 23rd, 1931, two weeks after their appointment, the Receivers procured an order (R., 521), authorizing them to invest "such amount or amounts of cash of the receivership estate as, in the judgment of the Receivers, is not needed at the time for expenses and working capital; * * * ".

And thereupon the Receivers proceeded to invest $1,030,000.00 of the company's cash (R., 257),—

$980,000.00 in United States Treasury Certificates of Indebtedness, and
$50,000.00 in Bank Certificates of Deposit.

One million thirty thousand ($1,030,000.00) Dollars—more than was necessary to pay the overdue interest on the debentures and the other debts of the company—the Receivers invested and kept invested in government and bank certificates because it was not needed in the conduct of the business.

The proponents of the reorganization plan were now ready for the transfer of the assets to the new company and on November 28th, 1931 (R., 516), the Reorganization Committee met to decide upon the procedure to be followed to accomplish that end. It was decided that the Bankers Trust Company should declare immediately due and payable, because of the default in the payment of interest, the principal of the outstanding debentures and after demand upon and refusal of payment by the

National Radiator Corporation, should institute suit and recover judgment therefor in the District Court of the United States for the Western District of Pennsylvania, and should thereafter intervene in this cause as a party plaintiff (R., 517-518).

That was done.

On December 24th, the Bankers Trust Company, as Trustee, declared the principal of the outstanding debentures due and on December 30th, 1931, after demand and refusal of payment, recovered judgment (R., 112-114).

Thus we have the spectacle of those who were responsible for the default in the payment of the interest now using that very default as the pretext for declaring the debentures due.

On January 9th, 1932, in conformity with the procedure adopted by the Reorganization Committee, the Bankers Trust Company as Trustee intervened in the cause as a party plaintiff and in its petition of intervention, adopted all the allegations of the bill and joined in its prayer for relief (R., 85).

The interest of Bankers Trust Company in the affairs of the National Radiator Corporation was more than merely that of Trustee.

It was the Bankers Trust Company, in conjunction with J. & W. Seligman & Company, New York bankers, which sponsored (R., 251) the formation of the merger which resulted in the creation of the company, and underwrote and sold (R., 269-280) the debentures to the public. And it took an active and authoritative part in the management of the company's affairs after its creation. It was consulted when one Grant Pierce became President of the company (R., 455), and its consent to the reorganization of the company and passing of the interest on the debentures was first sought and procured (R., 251; 417-418).

In the reorganization of the company, it played a predominant part.

At the November 28th, 1931, meeting of the Reorganization Committee (R., 516-520), certain questions relating to the new corporation came up for consideration. The matters considered were the appointment of:

1. Transfer agent of the stock of the new company.

2. Registrar of the stock of the new company.

3. Trustee of the new debentures.

Mr. Cornell, contact man between the Reorganization Committee and the Bankers Trust Company, reported that it was the wish of the Bankers Trust Company that the Transfer Agency should go to it, the Registrarship to Marine Midland Trust Company, and the Trusteeship to the New York Trust Company.

Thereupon the Committee appointed the Bankers Trust Company Transfer Agent; the Marine Midland Trust Company Registrar; and requested (R., 520):

> "• • • that Mr. Cornell express to Bankers Trust Company the wish of this Committee, to be effective, unless actually disapproved of by Bankers Trust Company, that the Trustee for the new debentures be the Manufacturers Trust Company."

The personnel of the Board of the new company also came up for consideration at that meeting. The Committee requested Mr. Cornell (R., 520):

> "• • • to ascertain of Bankers Trust Company and of J. & W. Seligman & Co. if they had any suggestions to make in respect to membership on said Board of Directors. It was the sense of the meet-

ing that said Board of Directors should consist of twelve members, one of whom would be Mr. Frank B. Cahn and that the remaining members should be persons satisfactory to Mr. Waters and of his nomination, to the extent that circumstances did not require the inclusion of any others."

Frank B. Cahn was to be a director because the Settlement Agreement so provided (R., 509). The other directors were to be appointed by John H. Waters, provided the Bankers Trust Company approved and did not appoint others.

The Bankers Trust Company, the trustee of the debentures under the Indenture, was a predominant participant in the reorganization of the National Radiator Corporation and Charles O. Cornell, apparently, was its representative upon the Reorganization Committee.

At the November 28th meeting there was also considered the upset price. It was the opinion of the meeting that the liquidating value of the National Radiator Corporation was $3,600,000.00 and the distributive value of the debentures $30.00 per $100.00 (R., 518-519).

In March, 1932, the court heard testimony for the purpose of fixing the upset price (R., 133).

No notice of the hearings was given to any non-assenting creditors and, with the exception of the intervener, First National Bank of Cincinnati (R., 133), **none took part in those hearings.**

Nor did the District Court order an appraisal to be made by independent and impartial experts. In fixing the upset price, the District Court relied upon the notions of Robert S. Waters (R., 136-224; 241-249), one of the receivers, Vice-President and General Manager of the company and a son of John H. Waters, President and Chairman of the Board of that company and a member of the Reorganization Committee; of Rudolph B. Flershem (R., 224-241), Chairman of

the Executive Committee of the company and also a member of the Reorganization Committee; of John H. Waters (R., 249-255); and of William G. Heiner (R., 255-266), the other receiver, an attorney at law (R., 255) who, previous to his appointment, had never any experience whatever in the radiator or boiler business (R., 256) and who, with the exception of the Johnstown and New Castle plants, had never visited any of the plants or properties of the company (R., 261). They testified it would be possible to realize for all the assets of the company, including almost $2,000,000.00 of cash, at most $2,300,000.00 (R., 153-154; 230; 231; 258-259). They based their opinions upon the financial condition of the company as of December 31st, 1931. The current assets at that time were as follows (R., 257-258):

Cash	$825,096.29
United States Certificates of Indebtedness	980,000.00
Interest on United States Certificates	6,124.97
Bank Certificates of Deposit	50,000.00
Cash Surrender Value of Life Insurance	22,900.00
Deposit New York Workmen's Compensation Law	18,686.33
Total Cash Assets	$1,929,807.59
Accounts Receivable (less reserve for bad debts, etc., R., 242)	858,992.41
Inventory	1,634,905.25
Total Current Assets	$4,423,705.25

Besides those assets, there were plants, machinery, patents, good-will, trade marks, patterns and investments in affiliated companies, which were carried on the books

of the company at $13,000,000.00 (R., 523) and which, in 1927 when the merger was formed and the debentures sold, were appraised at upwards of $16,000,000.00 (R., 274). Eighteen million dollars of assets were, in their opinion, worth a paltry $400,000.00 over and above the $1,929,807.59 of cash on hand. They explained that the difference between the book value and their alleged appraisals represented the difference between liquidation and a going concern (R., 148; 150; 153-154; 220-221; 223; 227-228; 231; 233; 234; 251).

They justified the appraisals on the ground that there were no buyers (R., 251; 266) and that the property would have to go as "scrap" (R., 251; 257; 263) at "panic" prices (R., 154; 227).

On May 31st, 1932, the court ordered sold all property and interests in property of every kind, character and description, including all the business, good-will, corporate name, patents, trade marks, trade names, bills and accounts receivable, choses in action and *cash on hand or in bank* (R., 297), and fixed the upset price therefor at $2,500,000.00 (R., 326).

The action was instituted by the Reorganization Committee upon its claim for unpaid interest upon the deposited bonds (R., 10); but the decree, however, ordered the sale to enforce the judgments recovered by the Bankers Trust Company (R., 297). The decree directed the payment (R., 296), within ten days, by the National Radiator Corporation or by someone on its behalf of the judgments recovered by the Bankers Trust Company, and in default of such payment (R., 297), directed the sale of the properties.

The proceeds of the sale, after the payment of all the receivership expenses, were ordered distributed to the creditors who are perpetually enjoined from suing the defendant or the purchaser upon any claim due from the defendant (R., 309).

Out of the proceeds merchandise and service creditors are to be paid in full, for the credit and good will of the company must be maintained for the benefit of the reorganization (R., 395; 459).

On August 8th, 1932, the Reorganization Committee purchased the business and assets of the corporation as a going concern for the sum of $2,550,000.00 (R., 367-375).

The purchasers at the sale were Ludington and Resley and they immediately assigned their bids to the National Radiator Corporation (Md.), the new company organized for the purpose of taking over the assets under the reorganization plan.

On August 18th the matters of the approval of the reorganization plan and the confirmation of the receivers' sale came on for hearing and on September 8th the decree confirming the sale and approving the plan was entered (R., 299).

It was evident that the Reorganization Committee would be the only purchaser at the sale and that the so-called sale was held merely for the purpose of appraising the value of the debentures held by non-assenting holders. And upon the basis of the sale price, after deducting the receivership expenses and fees, non-assenting creditors will receive but very little.

The action was instituted in order to preserve the going concern value of the company for the benefit of all creditors.

The complainants alleged (R., 12) that "the going concern value of the defendant's business and properties should be maintained, continued and kept intact *for the benefit of all creditors,* until all of the assets and business of the defendant can be sold as an entirety, *and the complainants believe that this can be accomplished*".

The complainants also alleged (R., 12) and the District Court found (R., 295):

"* * * The unity of the property of National Radiator and its integrity as a whole, as now held and operated, the administrative, technical and sales organization and the good-will of its customers, constitute, however, most important elements of value."

The court ordered sold and the Reorganization Committee purchased a going concern (R., 297). Nevertheless, the District Court held that non-assenting creditors were entitled to their aliquot share of the liquidating value of the assets at a time when there were no purchasers therefor (R., 281-282). The receivership was instituted and continued for the purpose of preserving this going concern value and non-assenting debentureholders are charged with the expenses of that receivership (R., 309), but receive none of the benefits thereof.

Judge Gibson justified the exercise of jurisdiction, in this case, on the ground that the company, because of its large, annual losses, was moving towards bankruptcy and that a reorganization was necessary to prevent that (R., 280).

In that view, the Circuit Court of Appeals concurred (R., 534). That court sustained the exercise of jurisdiction by the District Court on the ground of insolvency —not present insolvency—but possible future insolvency. In its opinion, per Woolley, C. J., the court said (R., 537):

"* * * It is pertinent to note the bill did not say the corporation was insolvent. That, in effect, was a tacit admission or declaration of its solvency. The corporation, by its answer, admitted the truth of all allegations of the bill. Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. * * *"

It, too, was disturbed by the apparent, average annual losses, after payment of interest, of $1,310,000.00 (R., 535) and it foresaw inevitable disaster to the company if the interest payments upon its debentures continued. The opinion of the court continues as follows (R., 539):

> "* * * Here the corporation could presently pay (the interest), but payment foretold imminent consequences disastrous to the corporation and, what is more to the point, disastrous to its securityholders. Plainly those consequences were insolvency with its attendant evils to all concerned. * * *"

That court conceded that the corporation was and would for some time be able to pay the interest upon the outstanding debentures; but in its opinion, the continued payment of the interest presaged insolvency for the corporation some time in the future and on that ground sanctioned the intervention of a court of equity.

It cannot be denied that the National Radiator Corporation was operating at a loss, but those losses were not as great as they might, on paper, appear. The greater part of those losses were bookkeeping losses; the cash losses were considerably less. Included in the $1,310,000.00 of average annual losses found by the Circuit Court of Appeals (R., 535) were charges for depreciation, reserves for bad debts and other deductions which consumed none of the company's cash. In the Record (R., 498), is a statement of earnings of the company for two twelve-month periods ending September 30th, 1930 and 1931, respectively, and in that statement the various items of loss are segregated. An analysis of these statements will prove our point.

1930.

Operating income	$308,950.00
Other income	73,195.00
Total	$382,145.00
Interest	721,948.00
Cash loss for 1930	$339,803.00

1931:

Operating income (deficit)	$29,146.00
Other income	52,281.00
Net income	$23,135.00
Interest	697,157.00
Cash loss for 1931	$674,022.00

It is quite evident that the actual cash losses sustained by the company were considerably less than the apparent, average, annual losses and that the company was financially able to withstand them.

Specification of Errors.

Petitioners rely upon the Specification of Errors set forth in the brief submitted in support of the Petition for the Writ of Certiorari, which are as follows:

1. The Circuit Court of Appeals erred in affirming all orders and decrees of the District Court appealed from.

2. The Circuit Court of Appeals erred in not reversing the decrees of the District Court, dated October 9th,

1931, May 31st, 1932 and September 8th, 1932, as to the petitioners and all other creditors who did not assent to the plan of reorganization.

3. The Circuit Court of Appeals erred in holding that jurisdiction over the subject matter of the cause existed and was properly exercised.

4. The Circuit Court of Appeals erred in holding that the exercise of jurisdiction in this cause did not constitute a taking of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

Summary of Argument.

The exercise of jurisdiction in this cause marks a departure from the accepted principles of law governing equity receiverships; violates the fundamental rules of property and rights of creditors; and constitutes a taking of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

It is a fundamental principle of our jurisprudence that the property of a debtor should be applied to the payment of his debts. To that end our courts—law and equity—are invested with power to sell the property of an unwilling debtor and to distribute the proceeds to his creditors; but payment may not be demanded nor the power invoked before the debt is due.

The creditor has not the right of selection and if the property available to legal process be sufficient to discharge the debt, no appeal to equity lies. The appeal, whether to law or equity, is for the enforcement of payment through the power of sale and distribution.

Equity, however, will not exercise its jurisdiction except where the legal remedy is inadequate.

The assets of an insolvent corporation are deemed held in trust for the benefit of its creditors and equity will take jurisdiction to administer that trust. This trust doctrine has been extended also to corporations in imminence of insolvency; corporations which though solvent would be rendered insolvent if all creditors with debts presently due and maturing should insist upon immediate payment.

Jurisdiction, however, depends upon the right to enforce payment through its power of sale and distribution. It is distinctly a creditors' remedy for the enforcement of creditors' rights. The reason underlying its exercise is the rule of distribution ratably amongst creditors of the corporation.

Receivership is an ancillary remedy granted—pending sale—to prevent the acquisition of priority and preference in such distribution.

Reorganization is but an incident of the exercise of that power. It is a combination of persons with similar interests and whose interests are equitably adjusted to purchase the property at the sale and to use such property after purchase to their mutual advantage. The *raison d'être* of the remedy, however, is the enforcement of payment and not reorganization.

It is therefore essential to the exercise of jurisdiction that the corporation be insolvent or be in imminence of insolvency; that it have debts presently due and payable but which it is unable to pay. The mere refusal to pay does not confer jurisdiction upon the court; there must be debts now due and the inability to pay them.

That essential element is manifestly lacking in this case. The power of sale and distribution was usurped for the purpose of hindering and delaying creditors and absolving the corporation from debts not yet due and

not maturing until 1947. Reorganization was the primary relief sought and the power of sale was the means adopted for its accomplishment. Jurisdiction was assumed and retained not because of present insolvency through inability to pay debts presently due and maturing, but because of possible future insolvency through the possible inability in the future to pay debts which would then mature. Such a doctrine substitutes conjecture for accepted principles of law. It is without precedent.

If possible future inability to pay debts not yet due can be laid as a basis for the use of the power of sale and distribution, then such rule should be available to the creditors as well as the debtor. Clearly, over the objection of the National Radiator Corporation which was able to pay its debts present and maturing in full, in cash, such a right would not be allowed.

Jurisdiction cannot be conferred by consent, nor can a debtor by collusion with a friendly creditor and an obliging trustee effect a transfer of its assets and a commutation of its debts. The granting of a remedy where no right thereto exists constitutes a denial of due process of law to those who are prejudiced thereby.

Because in the proper case a reorganization may result from the assumption of jurisdiction by a court of equity that does not justify the exercise of jurisdiction where the basic essential elements do not exist.

The petitioners submit:

I. The suit was collusively brought for the purpose of coercing non-assenting debentureholders into subjection to the plan or else to wipe out their rights under the debentures and under the Indenture governing their issue.

II. A court of equity may not exercise its power of sale and distribution over a corporation which is solvent

and able to pay its debts as they mature in regular course, in order to effectuate the transfer of those assets to a new company free from the obligations of the old.

III. A court of equity may not exercise its power of sale and distribution over a corporation which is solvent and able to pay its debts as they mature in regular course, for the sole purpose of enabling it to scale its funded debt through reorganization.

IV. The court lacked jurisdiction, and the exercise of jurisdiction by it in this case constituted a taking of property from non-assenting creditors without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

Argument.

I.

The suit was collusively brought for the purpose of coercing non-assenting debentureholders into subjection to the plan or else to wipe out their rights under the debentures and under the Indenture governing their issue.

In its petition of intervention the First National Bank of Cincinnati charged (R., 95) that "the original complainants herein * * * filed their said Bill of Complaint for the purpose of bringing about the receivership herein as a step in effectuating said plan" (of reorganization), and in their answer to that petition, the complainants admitted (R., 99) that "they filed the Bill of Complaint in this cause as a step in effectuating the Plan and Agreement of Reorganization dated February 11, 1931".

Concededly, the avowed purpose of the suit was to effectuate a reorganization of the company; and, admittedly, all things done were done towards accomplishing that result.

As to holders who had, by the deposit of their debentures, assented to the reorganization, the suit was not necessary. *Between the Reorganization Committee and the National Radiator Corporation no controversy existed. Both had decided upon reorganization and had agreed upon the plan to be adopted.*

On September 15th, 1931, the plan was declared operative (R., 362), and all that remained to be done was to organize a new company, transfer to it the assets of the old and distribute to those who had assented the new securities in exchange for the old.

The objection to that course, however, was that non-assenting debentureholders would be entitled either to the redemption of their debentures or else to an assumption of those debentures by the new company (R., 30-32). That did not coincide with their designs.

The only controversy was between the parties to the cause and the dissenting debentureholders. The purpose of the suit was to prevent the dissenting debentureholders from enforcing their rights and to compass the transfer of the assets, business and properties of the National Radiator Corporation free from the obligation to them.

Non-assenting debentureholders must be forced into the plan or else wiped out.

But the company was solvent.

The statement, by the Circuit Court of Appeals, that the National Radiator Corporation was insolvent within the definition of the Bankruptcy Act (R., 537) is untenable. That statement was based upon the upset price of $2,500,000.00 and the sale price of $2,550,000.00 (R., 536).

The Bankruptcy Act, Sec. 1 (15), Act of July 1, 1898, c. 541, 30 Stat. 544, defines insolvency as follows:

> "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts;"

The National Radiator Corporation was a going concern and a fair valuation of its assets as a going concern is not the scrap value (R., 263) in liquidation at panic prices in the midst of a world-wide depression.

Geddes v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 601.

In re Bucyrus Road Machinery Co., 10 F. (2d) 333.

Suring State Bank v. *Giese, et al.*, 210 Wis. 489, 246 N. W. 556.

Moreover, in the new company those very assets are valued at upwards of $16,000,000.00 (supra, p. 8) and securities, for that amount, are to be issued therefor.

The corporation was solvent within every acceptation of that term. Its assets at fair valuation exceeded its liabilities and it was able to pay its obligations in due course as they matured, in full.

Non-assenting debentureholders had already brought suit to recover the overdue interest, and that recovery must, nevertheless, be prevented.

On October 1st, 1931, the plan of action was evolved (R., 512-514).

The Reorganization Committee would instruct the Bankers Trust Company to demand the payment of the overdue interest; as trustee, the Bankers Trust Company would demand the payment of all the overdue interest upon all outstanding debentures and as depositary

it would demand the overdue interest upon the deposited debentures. The demand would be refused and then the Reorganization Committee would institute suit for the appointment of receivers and the Bankers Trust Company, as Trustee, would sue to recover judgment for the entire overdue interest.

That was done, and the collection of the overdue interest by the dissenting debentureholders was thus prevented.

The next step in the plan of action was decided upon at a meeting of the Reorganization Committee held on November 28th, 1931 (R., 516-520). At that meeting it was decided that the Reorganization Committee would request Bankers Trust Company to declare the principal of the outstanding debentures due, would demand payment, obtain judgment and would then intervene in the cause as a party plaintiff. The company, of course, would be unable to pay the judgment and its property would, therefore, be sold and non-assenting debentureholders would receive their aliquot share of what the Reorganization Committee would grudgingly pay for that property.

That was done, and the rights of non-assenting creditors were thus wiped out.

Courts of equity are not sanctuaries to which solvent corporations may flee for refuge from their creditors; nor may courts exercise their jurisdiction to hinder, delay and defraud creditors.

> *Harkin* v. *Brundage*, 276 U. S. 36, 52.
> *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334.
> *Shapiro* v. *Wilgus*, 287 U. S. 348.

> "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed

in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

Graffam v. *Burgess*, 117 U. S. 180, 186.

II.

A court of equity may not exercise its power of sale and distribution over a corporation which is solvent and able to pay its debts as they mature in regular course, in order to effectuate the transfer of those assets to a new company free from the obligations of the old.

It was the purpose of the reorganizers to obtain judicial sanction to the obliteration of non-assenting creditors, through the adoption of legal forms for its accomplishment. To achieve that purpose, the complainants applied to the court to exercise its power of sale and distribution. They made this application, as creditors, to a court of equity. They declared that the corporation was indebted to them in the sum of $567,840.00 (R., 10), the unpaid interest upon the deposited bonds; but they did not demand a judgment upon which they could levy execution. Instead they demanded the sale of all the assets of the company and, pending such sale, the appointment of receivers (R., 12).

If collection of the interest was the object of the suit, then the complainants had a complete and adequate remedy at law and the bill should have been dismissed, for the National Radiator Corporation was solvent and able to pay its debts as they matured.

Section 267 of the Judicial Code.
Oelrichs v. *Spain*, 82 U. S. (15 Wall.) 211.
Lewis v. *Cocks*, 90 U. S. (23 Wall.) 466.
Reynes v. *Dumont*, 130 U. S. 354.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.
Matthews v. *Rodgers*, 284 U. S. 521.

Section 267 of the Judicial Code, Act of March 3, 1911, c. 231, Sec. 267, 36 Stat. 1163; 28 U. S. C. 384, provides as follows:

> "**Suits in equity, when not sustainable.** Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

The mere refusal by a corporation to pay its debts does not vest a court of equity with the power to sell its assets and distribute its proceeds; nor does it confer upon the court the right to appoint receivers thereof pending such sale.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.
Luhrig Collieries Co. v. *Interstate Coal & Dock Co.*, 281 Fed. 265.

In the absence of matters cognizable in equity, a court of equity may not take jurisdiction of a corporation and order its assets sold and its proceeds distributed.

Board of Public Works v. *Columbia College*, 84 U. S. (17 Wall.) 521.
Ager v. *Murray*, 105 U. S. 126.
Freedman's Savings & Trust Company v. *Earle*, 110 U. S. 710.
Scott v. *Neely*, 140 U. S. 106.
Cates v. *Allen*, 149 U. S. 451.
Mississippi Mills v. *Cohn*, 150 U. S. 202.

In the case of an insolvent corporation, its assets are deemed to be held in trust for the benefit of its creditors and a court of equity will take jurisdiction for the pur-

pose of administering that trust. This trust doctrine has been extended to corporations in imminence of insolvency; corporations which, though solvent, would be rendered insolvent if all creditors with debts presently maturing should insist upon immediate payment. But no such trust and no such right exist in the case of a corporation which is solvent and able to pay its debts as they mature in regular course.

Graham v. *Railroad Company*, 102 U. S. 148.
Hollins v. *Brierfield Coal & Iron Company*, 150 U. S. 371.
McDonald v. *Williams*, 174 U. S. 397.
Metropolitan Railway Receivership, 208 U. S. 90.
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.
Michigan v. *Michigan Trust Co.*, 286 U. S. 334.
Shapiro v. *Wilgus*, 287 U. S. 348.
Kingsport Press, Inc. v. *Brief English Systems, Inc.*, 54 F. (2d) 497.
May Hosiery Mills, Inc. v. *F. & W. Grand 5-10-25 Cent Stores, Inc.*, 59 F. (2d) 218.
Sidway v. *Missouri Land & Live-Stock Co.*, 101 Fed. 481.
Hutchinson v. *American Palace-Car Co.*, 104 Fed. 182.
United States Shipbuilding Co. v. *Conklin*, 126 Fed. 132.
Zuber v. *Micmac Gold Mining Co.*, 180 Fed. 625.
Burton v. *R. G. Peters Salt & Lumber Co.*, 190 Fed. 262.
Maguire v. *Mortgage Co. of America*, 203 Fed. 858.
Davis v. *Hayden*, 238 Fed. 734.
Myers v. *Occidental Oil Corporation*, 288 Fed. 997.
Willson v. *Waltham Watch Co.*, 293 Fed. 811.

In the instant case there was neither allegation nor proof of insolvency; but there was abundant proof of solvency within every definition of that term. The court therefore lacked jurisdiction and its exercise of jurisdiction was improper.

Grignon's Lessee v. *Astor*, 43 U. S. (2 How.) 319.
Cooper v. *Reynolds*, 77 U. S. (10 Wall.) 308.
Reynes v. *Dumont*, 130 U. S. 354.

Where no jurisdiction exists, it cannot be conferred by consent of the parties.

People's Bank v. *Calhoun*, 102 U. S. 256.
Minnesota v. *Hitchcock*, 185 U. S. 373.
Davis v. *Hayden*, 238 Fed. 734.

It is the prerogative of every corporation to discontinue its business and wind up its affairs. But a corporation may not transfer its assets to a new company and, so disguised, conduct the old business free from the old obligations. Nor can a sale under a consent or collusive decree be used as a subterfuge for a fraudulent conveyance.

Railroad Company v. *Howard*, 74 U. S. (7 Wall.) 392.
Johnson v. *Waters*, 111 U. S. 640.
Chicago, Milwaukee & St. Paul Railway Company v. *Third National Bank of Chicago*, 134 U. S. 276.
Louisville Trust Company v. *Louisville, New Albany & Chicago Railway Company*, 174 U. S. 674.
Northern Pacific Railway Company v. *Boyd*, 228 U. S. 482.

Kansas City Southern Railway Co. v. *Guardian Trust Company*, 240 U. S. 166.

United States v. *Butterworth-Judson Corporation*, 269 U. S. 504.

Kansas City Terminal Railway Company v. *Central Union Trust Company of New York*, 271 U. S. 445.

It is urged (R., 538), however, that although the corporation was solvent on October 5th, 1931, when the bill was filed, it was insolvent or in imminence of insolvency on December 30th, 1931, when the Bankers Trust Company recovered a judgment for the full amount of the principal and unpaid interest upon the outstanding debentures, and that if the court lacked jurisdiction when the bill was filed, that defect was cured by the intervention of the Bankers Trust Company on January 9th, 1932.

If jurisdiction did not exist *ab initio*, the later recovery of the judgment and intervention by the Bankers Trust Company did not invest the court with jurisdiction.

In *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, this Court said at page 501:

> "Respondent contends that, even if there was originally lack of equity jurisdiction, the defect was cured on October 8, 1921, when the intervention of the United States Shipping Board Emergency Fleet Corporation was filed and allowed. That corporation claimed to be a creditor and to have a mortgage lien on all the real estate of The Pusey & Jones Company. The contention is that the original defect in jurisdiction was thus cured, because the existence of a direct lien gives equity jurisdiction for the appointment of receivers, unhampered by the obstacles that confront unsecured simple contract creditors. *The contention is clearly unsound; among*

other reasons, because the intervention did not occur until two months after entry of the decree here under review." (Italics ours.)

Furthermore, the recovery of the judgment and the intervention by the Bankers Trust Company were a part of a collusive scheme to defeat non-assenting debenture-holders of their rights (supra, pp. 11; 14). It is a collusive judgment founded upon the non-payment of interest, for the payment of which there were ample funds and in the non-payment of which the Bankers Trust Company, the National Radiator Corporation and the Reorganization Committee concurred. The judgment was recovered to obviate the defense of insolvency and to furnish an excuse (R., 296-297) for the sale of the assets. Deliberate defaults cannot be laid as the basis for collusive judgments in order to wipe out the rights of creditors.

Johnson v. *Waters*, 111 U. S. 640.
Louisville Trust Company v. *Louisville, New Albany & Chicago Railway Company*, 174 U. S. 674.
Conley v. *International Pump Co.*, 237 Fed. 286.

In a society founded on private ownership, the rights of property must be held sacred and cannot be annulled, except in accordance with established principles of law—common or statutory.

Wilkinson v. *Leland*, 27 U. S. (2 Pet.) 627.
Gunn v. *Barry*, 82 U. S. (15 Wall.) 610.

III.

A court of equity may not exercise its power of sale and distribution over a corporation which is solvent and able to pay its debts as they mature in regular course, for the sole purpose of enabling it to scale its funded debt through reorganization.

In its opinion, the Circuit Court of Appeals said as follows (R., 539):

> "* * * It is the presence of equitable grounds calling for relief in equity which gives the court jurisdiction. *A court of equity is not a forum of convenience to be used by a corporation merely to straighten out its business difficulties or to rebuild its financial structure.* Nor is it a place of refuge to which debtors may go for protection against their creditors and against the remedies of suit, judgment, execution and sale which the law affords them. Debtor corporations are not wards of chancery. There is nothing in the mere fact of a corporation's indebtedness, nor in its inability to pay, nor in its wish to make some composition with its creditors that confers equitable jurisdiction upon a court. It is only when there is something in a situation which sets up an equitable right and admits of equitable relief that parties may go into a court of equity and assert one and obtain the other. Common instances are where a corporation is insolvent or where its insolvency is imminent. * * *" (Italics ours.)

The ground for the exercise of jurisdiction in this case is, in the language of that court, as follows (R., 539-540):

> "* * * The fact that the corporation had in hand sufficient money to meet certain current indebted-

ness did not alter the underlying conditions. Continental & Commercial T. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 613; In re Babcock, 26 Fed. (2d) 153. The facts of the situation, showing, as we find, imminence of insolvency and collapse, calling for protection of creditors, constituted a ground of equity for which relief could validly be asked by simple contract creditors within the law of The Pusey & Jones Company v. Hanssen, 261 U. S. 491, and within the warning of Shapiro v. Wilgus, 287 U. S. 348. * * *"

In theory the Circuit Court of Appeals is in accord with us upon the powers of a court of equity; in practice, it is not. That court approved the very things which it condemned; it upheld the power of a court of equity to scale the funded debt of a corporation through reorganization.

The insolvency which it apprehended was not present nor imminent, but contingent and future. It was of the opinion that due to the decline of business brought about by the depression, a continuance of the interest payments would eventually, unless business improved, bring the company to insolvency. **And it was that insolvency which it deemed imminent and sought to avoid.**

The company, in its opinion, was operating at a loss, —much less earning the interest upon the debentures— and it deemed it to the best interests of all concerned, if the corporation would survive the depression, that the interest payments be suspended. Although the company had the funds for the payment of interest, it was the judgment of that court that the cash should be conserved.

Although the plan of reorganization made no provision for the reinstatement of the old debentures upon the revival of business, but permanently cut the principal of those debentures in half and upon that half reduced the

interest, the payment of which itself was contingent on earnings, that court, nevertheless, approved it as a salutary measure.

The sale was employed as a device to effect a transposition of the assets from the old company to the new, in order to free the National Radiator Corporation from the obligations to debentureholders who refused to assent to the plan of reorganization; and the use of that device for that purpose was upheld and approved by that court.

If possible, future insolvency may be laid as the basis for the interposition of a court of equity, then by what touchstone shall such insolvency be tested?

The thesis upon which reorganization rests is that business will improve and that time will convert losses into profits. Otherwise there would be no reason for reorganization and the only reasonable and sane course would be liquidation and distribution of the proceeds. In these circumstances, therefore, who shall say **prospectively** that the losses which may produce such insolvency may not, before the happening of such eventuality, disappear and be replaced by profits? Who shall determine that reorganization is necessary and when it is necessary? If discretion is to be the criterion, who may exercise that discretion, and how may that discretion be controlled and regulated?

The doctrine is novel, unprecedented and pernicious, and to uphold it is to sanction, in times of depression, the suspension of property rights and rights of creditors. If losses in the conduct and operation of a business justify a court of equity to interpose in the affairs of a corporation and to reorganize it, then what company would not in the last three years have been justified to appeal to equity for the granting of such relief?

The doctrine of the lower courts goes beyond even the provisions of statutes enacted for the reorganization of corporations. Such statutes permit such reorganization

only in the event that the corporation is insolvent or is unable to meet its debts as they mature in regular course.

See *National Surety Company* v. *Coriell,* 289 U. S. 426, 437.

The recent amendments to the Bankruptcy Act, Act of March 3rd, 1933, c. 204, Sec. 1, 47 Stat. ——, permitting the reorganization of railroad companies, provide as follows:

> "Reorganization of railroads engaged in interstate commerce. (a) Any railroad corporation may file a petition stating that the railroad corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization."

A court of equity may no more seize and sell the assets of a solvent corporation than a court of probate may seize and sell the assets of a living person. Physical death confers jurisdiction in the one case, *Scott* v. *McNeal,* 154 U. S. 34; civil death, insolvency, in the other, *Graham* v. *Railroad Company,* 102 U. S. 148.

In *Graham* v. *Railroad Company,* supra, this Court said at page 160:

> "It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate

duty. This, as we understand, is the substance of the position taken.

"We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

"*When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust-fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds, trust-funds, which, in other circumstances, are as much the absolute property of the corporation, as any man's property is his.*" (Italics ours.)

A court of equity may not seize and sell the assets of a solvent and going corporation merely because its business is unprofitable and losses are sustained in its operation, nor because it is without sufficient funds or resources with which adequately to prosecute its business.

Curtiss v. *Dean & Curtiss*, 85 Wash. 435, 438; 148 Pac. 581.

Worth Manufacturing Co. v. *Bingham*, 116 Fed. 785.

Hirsch v. *Independent Steel Company of America,* 196 Fed. 104, appeal dismissed 225 U. S. 698.

An insolvency which is contingent on earnings and which may occur, if at all, in the future, is not imminent.

Arnold v. *Globe Exchange Bank,* 40 F. (2d) 955, affirmed C. C. A. (2d) 45 F. (2d) 1010.

In *Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.,* 281 Fed. 265, Learned Hand, D. J., describes the conditions which constitute imminent insolvency at page 270 as follows:

> "It was, as I have said, proper enough not to allege insolvency, and in its stead the bill alleged that the corporation was largely indebted and could not pay its debts, that its assets could not be quickly converted, that its creditors were threatening to attach, and had begun to do so, and that, though the assets were enough to pay all, if properly conserved, yet, if no receivers were appointed, they would be dissipated, 'to the great injury of creditors and stockholders'."

In the case at bar there was no pretense that the company was unable to pay its debts. The objection was only to the payment of the interest upon the debentures and the ground of that objection was, in the language of the complaint (R., 11) that:

> "The defendant has no means at hand with which to meet, pay or satisfy the interest charges on the Debentures overdue as aforesaid, without seriously jeopardizing the ability of the defendant to continue its business and without making it difficult or im-

possible for the defendant to secure necessary supplies, materials and labor to continue the operation of its plants and the sale of its products. * * *"

It is conceded by all that the company had *in cash alone* more than sufficient to pay and discharge every debt then due and payable.

Courts are remedial agencies designed to enforce rights and redress wrongs. They may penetrate the form to the substance and may not refuse relief merely because an old wrong wears a modern garb. But they must accept the economy of the society in which they function and recognize the rights and wrongs of the society which has established them. They may not create rights; they may only enforce those which exist.

In *United States* v. *Union Pacific Railroad Company*, 98 U. S. 569, this Court said at page 620:

> "A court of justice is called on to inquire not into the balance of benefits and favors on each side of this controversy, but into the rights of the parties as established by law, as found in their contracts, as recognized by the settled principles of equity, and to decide accordingly. * * *"

In *Treadwell* v. *Salisbury Manufacturing Co.*, 7 Gray (Mass.) 393, Bigelow, J., in defining the powers of a court of equity over corporations, says at 399:

> "Indeed it is too well settled to admit of question, that a court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their actions, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief. Their rights and duties are regulated and governed

by the common law which in most cases furnishes ample remedies for any abuse of corporate powers and privileges, which may injuriously affect either public or private rights. It is only when there is no plain and adequate remedy at law, and a case is presented which entitled a party to equitable relief, under some general head of chancery jurisdiction, that a bill of equity can be maintained against a corporation and this rule is applicable to stockholders as well as to other persons."

See also:

Hardon v. *Newton*, 14 Blatch. 476, 11 Fed. Cases No. 6054.

Myers v. *Occidental Oil Corporation*, 288 Fed. 997.

Republican Mountain Silver Mines v. *Brown*, 58 Fed. 644.

"The first inquiry arising on these facts is, What relief can be given and who is entitled to it?"

United States v. *Union Pacific Railroad Company*, 98 U. S. 569, 610.

Undoubtedly the debtor may not complain that the payment of his debts entails a loss upon him, nor may he ask that the debt be waived or cancelled so that that loss may be avoided. Nor may he demand that, upon payment of the present liquidation value of his assets, he be released from his debts and that he be permitted to retain those assets free from all future liabilities and obligations. The debtor may not (except by composition in bankruptcy) ransom his property by paying to his creditors the present liquidation value thereof,—and es-

pecially not by paying to his creditors what he deems to be the liquidation value thereof.

Sturges v. *Crowninshield*, 17 U. S. (4 Whea.) 122, 197.
Lake St. El. R. Co. v. *Ziegler*, 99 Fed. 114.

Nor may the creditor to whom payment is being made in due course demand that the corporation be wound up and its assets distributed, merely because the operation of that company is unprofitable and he fears the inability of the company to pay, in the future, the obligations which would then mature to him.

United States v. *Union Pacific Railroad Company*, 98 U. S. 590.
Mills v. *Northern Railway Company*, L. R., 5 Ch. App. 621.
Pond v. *Framingham & Lowell R. R. Co.*, 130 Mass. 194.
Worth Mfg. Co. v. *Bingham*, 116 Fed. 785.
Willson v. *Waltham Watch Co.*, 293 Fed. 811.

Where no rights exist, they cannot be created by collusion between the debtor and some friendly creditors.

And the use by the court of its power of sale as a device for freeing the National Radiator Corporation of its obligations to non-assenting creditors is a perversion of its jurisdiction and function. That power—whether in law or in equity—may only be used to enforce payment of genuine debts, honestly matured.

Louisville Trust Company v. *Louisville, New Albany and Chicago Railway Company*, 174 U. S. 674.
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.
Ager v. *Murray*, 105 U. S. 126.

Board of Public Works v. *Columbia College*, 84 U. S. (17 Wall.) 521.

Gardner v. *London, Chatham & Dover Railway Company*, L. R., 2 Ch. App. 201.

Burton v. *R. G. Peters Salt & Lumber Co.*, 190 Fed. 262.

Gutterson & Gould v. *Lebanon Iron & Steel Co.*, 151 Fed. 72.

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.*, 281 Fed. 265.

In *Gardner* v. *London, Chatham & Dover Railway Company*, L. R., 2 Ch. App. 201, Sir H. M. Cairns, L. J., said at page 212:

> "Now, I apprehend that nothing is better settled than that this court does not assume the management or undertaking except with a view to the winding up or sale of the business or undertaking. The management is interim management; *its necessity and justification spring out of the jurisdiction to liquidate and sell;* the business or undertaking is managed and continued in order that it may be sold as a going concern and with the sale the management ends." (Italics ours.)

In *Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.*, 281 Fed. 265, Learned Hand, D. J., in defining the nature and purpose of the bill, says at page 270:

> "The origin and nature of the bill stamps it as in rem. It is to reach the assets of the debtor and apply them to the creditors. As such it goes directly against the assets themselves in substitution for attachment and execution."

In the instant case, the court's power of sale was employed not to enforce the rights of creditors but to defeat them; and to enable the debtor to retain possession of its property, free from the obligation to its creditors. The court usurped jurisdiction to enforce a right which did not exist and to grant relief to one who was not entitled thereto.

IV.

The court lacked jurisdiction, and the exercise of jurisdiction by it in this case constituted a taking of property from non-assenting creditors without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

The suit was instituted not to enforce the payment of debts nor to assure an equitable distribution ratably amongst creditors of the corporation. It was instituted to coerce non-assenting debentureholders to cut their claims in half; to acquiesce in the reduction of the interest; to submit to income bonds; to waive the unpaid interest; and to consent that merchandise and service creditors whose rights were no greater than theirs, should be paid in full. It was instituted not because the corporation was unable to pay its debts, but merely because it found the payment of the interest upon the debentures an inconvenience and hardship. Jurisdiction was assumed and exercised not because of the insolvency of the corporation but merely to enable the corporation, through reorganization, to scale its funded debt.

The plan makes provision for not one dollar of new capital; sacrifices are demanded of none but debentureholders.

But if success should come—no matter how affluent the company may become—the debentureholder is not entitled to have his old claims reinstated, nor to have

the rights which he has surrendered restored. He must submit absolutely to a plan initiated and sponsored by the debtor corporation, or else be wiped out.

We have demonstrated to this Court that jurisdiction for such purposes cannot be sustained under any principles of law or equity and that the exercise of jurisdiction was without authority or sanction.

In *Scott* v. *McNeal*, 154 U. S. 34, this Court said at page 46:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

In *Pennoyer* v. *Neff*, 95 U. S. 714, this Court, in defining jurisdiction, said at page 733:

> "* * * Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. * * *"

See also:

Rhode Island v. *Massachusetts*, 37 U. S. (12 Pet.) 657, 718.
Cooper v. *Reynolds*, 77 U. S. (10 Wall.) 308.
Grignon's Lessee v. *Astor*, 43 U. S. (2 How.) 319, 338.

The court, through the exercise of its jurisdiction, took the property of the non-assenting debentureholders and quite gratuitously gave it to the corporation. Without warrant or justification it extinguished the debentures held by non-assenting holders and released the National Radiator Corporation from its obligations to them; but it approved payment in full to merchandise and service creditors, who ranked equally with non-assenting debentureholders as general creditors of the corporation.

Courts of equity may not by judicial process transfer the property of one corporation to another having the same stockholders, in order to vest in the new company the property of the old free from the old debts. Nor can they sanction a transfer, the very purpose of which was to discriminate between creditors of equal rank.

Railroad Company v. *Howard*, 74 U. S. (7 Wall.) 392.

Northern Pacific Railway Company v. *Boyd*, 228 U. S. 482.

Kansas City Terminal Railway Company v. *Central Union Trust Company of New York*, 271 U. S. 445.

In *Holden* v. *Hardy*, 169 U. S. 366, this Court, in defining due process of law, said at page 390:

> "Recognizing the difficulty in defining, with exactness, the phrase 'due process of law', it is certain that these words imply conformity with natural and inherent principles and justice, and forbid that one man's property or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation. * * *"

> "* * * A contract is property. To destroy it wholly or to destroy it partially is to take it; and

to do this by arbitrary legislative action is to do it without due process of law."

Sinking-Fund Cases, 99 U. S. 700, 746.

And to do this by arbitrary judicial action is also to do it without due process of law.

Pennoyer v. *Neff,* 95 U. S. 714.
Scott v. *McNeal,* 154 U. S. 34.
Hovey v. *Elliott,* 167 U. S. 409, 417.

The exercise of jurisdiction in this case violates the fundamental principles of equity and justice and contravenes the due process clause of the Fifth Amendment of the Constitution of the United States.

Conclusion.

There exists an erroneous, but widely held belief, that diversity of citizenship in concatenation with the cabalistic formula, "multiplicity of suits, race of diligence, wasteful strife and controversy" vests in a federal court of equity the power to reorganize corporations and effect under judicial sanction a fraudulent transfer of assets with a commutation of debts. That receivership in creditors' suits is distinctly an ancillary remedy for the enforcement of creditors' rights is being constantly overlooked and the results flowing from the exercise of that remedy have been mistaken for the remedy itself.

Through this misapprehension of the function and purpose of creditors' suits and the appointment of receivers therein, a remedy designed for the prevention of wrongs to creditors has been perverted into a means for the frustration of rights of creditors; and jurisdiction assumed to assure equitable distribution amongst

creditors has, by transformation, been employed to bring about inequitable discrimination against creditors.

Indisputably, this cause was instituted for the purpose of effecting a reorganization of the National Radiator Corporation in accordance with the plan devised by the Reorganization Committee appointed by it.

It is apparent from even a superficial reading of the bill of complaint and the exhibits annexed thereto that the corporation was not insolvent nor threatened with immediate insolvency; that jurisdiction was invoked and receivers appointed to hold at bay debentureholders who refused to assent to the reorganization as planned and demanded payment of the interest upon the debentures they held. It is also apparent that the corporation could have paid to the Reorganization Committee and to the other debentureholders, as well as to every other creditor, every claim then due out of the cash then in its possession. It is evident that not payment but prevention of payment, with the ultimate acquisition of the property, business and assets of the corporation free from the obligation to pay, was the real purpose of the suit.

No reason for the sale of the assets and the distribution of the proceeds was shown and none existed; the appeal was made to the court to employ its power of sale and distribution as a subterfuge in order to accomplish the transfer, to the National Radiator Corporation, disguised in the form of a new corporation, of all its business, property and assets as a going concern, absolved from the obligation to pay its debts to its non-assenting creditors.

The assumption and retention of jurisdiction in the primary cause was a departure from accepted principles of law and constituted a taking of property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

The decrees of the Circuit Court of Appeals and the District Court should be reversed and adjudged void as to creditors and debentureholders who have not assented to the plan of reorganization.

In *International Life Insurance Company* v. *Sherman*, 262 U. S. 346, with respect to a situation analogous to the one at bar, this Court said at page 351:

> "The company could not thus be relieved of its obligations to non-consenting annuity certificate holders and have its property returned to it exempt from their claims. Their rights could not be so disposed of. As to them the decree was not a judicial determination and the courts of Missouri were right in holding it to be a nullity. See *Hovey* v. *Elliott*, 167 U. S. 409. *Windsor* v. *McVeigh*, 93 U. S. 274, 277. *McVeigh* v. *United States*, 11 Wall. 259."

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 64.

AMY ARZT and JOSEPHINE RAMSEY,
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITIONERS' REPLY BRIEF.

DAVID M. PALLEY,
of New York, N. Y.,

CHARLES H. SACHS,
LOUIS CAPLAN,
of Pittsburgh, Pa.,
of Counsel.

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PETITIONERS' REPLY BRIEF.

I.

As to Bankers Trust Company's preliminary statement.

The respondent, Bankers Trust Company, in its brief (p. 2) objects to our statement (Main Brief, p. 5) that the Bankers Trust Company, as Trustee, approved in advance the omission of the payment of the February 1st, 1931, interest upon the outstanding debentures of the National Radiator Corporation. Our statement is based upon the testimony of John H. Waters. He testified as follows (R., 418):

"Q. When you sent out the notice on February 2, 1931, that is in evidence here as Exhibit 1, didn't you know at that time the company would be reorganized?

"A. Well, it is possible no doubt there had been discussions to that effect.

"Q. Did you consult with the Bankers Trust Company prior to default in the payment of interest?

"A. Consult them with reference to what?

"Q. That there would be a default in the payment of interest?

"A. I presume so.

"Q. Don't you know whether you did or not?

"A. Well, I rather apprehend we did, but I can't just recall what conversation there might have been.

"Q. *Did they acquiesce in default of payment of interest?*

"A. *I presume so, yes.*"

As to the part played by the Bankers Trust Company and Seligman & Company in the conferences preceding the passing of the interest and the appointment of the Reorganization Committee, Waters' testimony was as follows (R., 417):

"Q. Mr. Waters, when for the first time was the matter of the reorganization of the National Radiator Company first taken up?

"A. The reorganization of the National Radiator Company or Corporation?

"Q. The corporation.

"A. Oh, I presume that was in the latter part of 1930 it was discussed.

"Q. And who participated in that discussion?

"A. Well, some of the bankers who were interested.

"Q. Well, particularly, which bankers?

"A. The Bankers Trust Company. They were largely interested.

"Q. And what other bankers, if any?

"A. Seligman & Company. They were largely interested."

(R., 251):

"Q. How came it that the Reorganization Committee was organized?

"A. Well, due to the full knowledge of the affairs of the company of myself and Mr. Flershem, we realized that under the original capitalization it would not be possible to carry the organization to a safe conclusion, and we then went to the bankers in New York, Bankers Trust Company and Seligman & Company, the two factors in the consolidation of these six different companies, and suggested a reorganization with a reduced capitalization."

Waters and Flershem had already appointed themselve and Charles O. Cornell as the Reorganization Committee and apparently the decision to pass the interest had already been made when the board of directors of the National Radiator Corporation met on January 31, 1931, and ratified the action of its managing officers (R., 500) and passed the resolution to omit the payment of the February 1st, 1931, interest (R., 501).

The Bankers Trust Company may not excuse its participation in the reorganization of the corporation on the ground that it was the owner in its proper right of $1,040,000.00 of debentures (their Brief, p. 2). If it found its interest as holder of bonds to be in conflict with its duties as Trustee, it should either have sold the bonds or resigned from its trust.

Equally insufficient and unsatisfactory is the excuse now made that the acts performed by it at the bidding of the Reorganization Committee were mandatory upon it under the Indenture of its appointment.

Why did it remain passive from February 1st, 1931, until October 13th, 1931? It was not ignorant of the motives and designs of the Reorganization Committee. Why did it not appear in court and expose them in behalf of all the bondholders whom it now declares it represented? Why did it resist vigorously the intervention of the First National Bank of Cincinnati (R., 97-98)? Why did it not insist upon a fair appraisal of the assets by disinterested and impartial experts?

Why did it stand supinely by and permit $4,423,705.25 of current assets, of which almost $2,000,000.00 was in cash (R., 257-258; Main Brief, p. 18) and fixed assets which in 1927, when it sponsored the merger and sold the debentures were valued at upwards of $16,000,000.00 (R., 274) and which were carried on the books of the corporation **after depreciation** at $13,000,000.00 (R., 523), to be appraised at a paltry $2,300,000.00 (R., 153-154; 230; 231; 258-259) and to be sold as a going concern for $2,550,000.00 (R., 367; 375)? Why did it in its petition of intervention adopt wholeheartedly the complaint of the Reorganization Committee and join implicitly in its prayers for relief (R., 87; 92)?

> "* * * Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the

rules of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * *"

Meinhard v. *Salmon*, 249 N. Y. 458, 464.

II.

Regarding some simple arithmetic.

A.

The statements in the brief of the Reorganization Committee (p. 3):

> "* * * that at the time the Receivers were appointed the defendant's cash was but little in excess of its interest and sinking fund obligations then due, totaling $1,094,429.50, and current liabilities of $157,511.89 (R., 295). * * *"

and (p. 5):

> "As already shown above, at the date of this receivership the defendant Corporation was indebted for interest and sinking fund payments and for current liabilities of $157,511.89 to a total of $1,251,941.39 and had this amount been paid it would have had cash left of only approximately $5,500."

are absolutely erroneous due to faulty arithmetic.

The total current debts of the National Radiator Corporation, when the receivers were appointed, did not exceed $900,000.00 (see Main Brief, p. 13). The sum then due for interest and sinking fund was not $1,094,429.50 but $741,464.19,—a mere difference of $352,965.31.

Interest upon the debentures was payable at the rate of 6½% on the first days of February and August in each year and on October 9th, 1931, when the receivers were appointed, the company was in arrears of two installments of interest (R., 9). If the whole $12,000,000.00 of debentures had been extant at that time, the interest would have amounted to $780,000.00, plus interest on that amount computed to October 9th. At that time, however, there were only outstanding $10,673,000.00 of debentures (R., 108) and the interest upon those debentures with interest thereon computed to October 13th, 1931 (when the Bankers Trust Company filed suit) amounted to $709,395.69, as set forth in the decree (R., 294).

On account of the sinking fund there was due then only the August 1st, 1931, installment which amounted to $201,918.50 (R., 108). As against that, the company had the right to deliver bonds (R., 279), for which under the Indenture it was entitled to credit at the redemption price (R., 279) of 107½ (R., 18). The company had on hand debentures in the principal amount of $158,000.00 (R., 108) which, at the redemption price, entitled it to credit of $169,850.00, leaving a balance due on account of sinking fund of only $32,068.50.

There is no dispute that there was due other creditors $157,511.89. But the aggregate of all the current debts including interest and sinking fund amounted to only $899,076.08. The company had on hand in cash at that time $1,257,381.59 (R., 521). Had it paid all of the obligations then due, there would still have remained in cash alone the sum of $358,305.51. That that amount was more than sufficient for the needs of the company is evidenced by the fact that immediately after their appointment the receivers invested $1,030,000—$130,000.00 more than the current liabilities—in United States and bank certificates of deposit (see Main Brief, p. 14).

B.

The statement in that brief (p. 3):

> "* * * With the maturity on February 1, 1932 of another installment of interest, the Corporation became completely insolvent in every sense of the word. * * *"

is also incorrect.

The interest for one-half year, to wit, from August 1st, 1931, to February 1st, 1932, upon $10,673,000.00 principal amount of debentures at the rate of 6½% per year, amounts to $346,872.50. To meet that interest payment there was about $600,000.00 additional cash.

On October 8th, 1931, the cash on hand amounted to $1,257,381.59 (R., 521). On December 31st, 1931, the cash or its equivalent amounted to $1,929,807.59 (R., 257) and on March 3rd, 1932 (R., 133), it amounted to $1,830,000.00 (R., 153-154; 155; 249). On February 1st, 1932, evidently, the company had on hand in cash or its equivalent about $600,000.00 additional with which to meet a payment of some $340,000.00 additional interest on the debentures.

C.

The statement in that brief that (p. 6):

> "* * * The properties themselves sold for $2,550,000, approximately 22% of the face amount of the Corporation's outstanding debt. * * *",

is misleading. Among the assets sold was cash (R., 297). So far as the Record discloses, the cash (including cash assets) in the possession of the receivers ranged from a high of $1,929,807.59 on December 31, 1931 (R.,

257), to a low of $1,570,852.15 on June 30, 1932 (R., 523) and approximately a like amount on the day of the sale, August 8, 1932 (R., 401-402). Thus the cash and cash assets themselves represented about 18% of the total debts on December 31, 1931, and about 14% on August 8, 1932, and the price realized for the assets of the company, exclusive of cash, ranged from a high of about 8% to a low of 4%.

Since the respondents are dealing with percentages, we will indulge in a few of our own.

On December 31, 1931, as of which date the assets were appraised for the upset price, there was on hand (R., 257-258; Main Brief, p. 18):

Current assets	$4,423,705.25
Included in that was cash, which we will deduct, amounting to	1,929,807.59
Leaving current assets, exclusive of cash, in the sum of	$2,493,897.66

The other assets of the company, such as plants, machinery, equipment, patents, etc., amounted to upwards of $13,000,000.00 (R., 523), making a total of assets, exclusive of cash, of $15,493,897.66. The upset price was fixed at $2,500,000.00, or roughly $600,000.00 above the cash on hand. All of the assets, current and fixed, were therefore appraised at less than 25% of the current assets, exclusive of cash, and at about 4% of the total assets, also exclusive of cash.

When the respondents speak of 22%, they do not take into account that out of that 22% there will have to be paid (R., 309-310): (1) all administration expenses, allowances and disbursements of the receivership, including the expenses of the sale; (2) the compensation and disbursements of the complainants and of their solici-

tors, and of the National Radiator Corporation, of its solicitors, and of the solicitors for the receivers in this cause; (3) the compensation of the Bankers Trust Company, its attorneys, and expenses and liabilities incurred by it; (4) all unpaid indebtedness and liabilities of the receivers; (5) the compensation of Robert H. Richards, Jr., one of the receivers appointed by the Chancery Court of the State of Delaware; and (6) the compensation and disbursements in the various ancillary suits. After all those expenses are paid, what will be left for non-assenting creditors is only problematical. We venture to say that unless this Court holds that as to non-assenting creditors, the decrees of the District Court are void and a nullity, non-assenting creditors would have fared far better if on March 3rd, 1932, when hearings for the purpose of fixing the upset price were held, they had accepted their distributive share of the $1,812,894.00 of cash then on hand (R., 249) (which represented about 17% of the total liabilities), and had renounced their right to share in the other assets of the company.

III.

The plan did not meet with the wholehearted support of the debentureholders. Many were coerced into it.

The Reorganization Committee in their brief (pp. 9-10) state as follows:

> "This suit really represents a two years' effort on the part of the great body of creditors to take over the corporate property for themselves. Their efforts have not been opposed by the Corporation, but strenuous resistance has come from a few creditors. Except for the obstruction by these few creditors, the overwhelming majority of the creditors

would long ago have taken over all of the corporate assets; they would have been in control of the management, and they would constitute the New Company. * * *"

The implication is and those respondents would have it appear that this reorganization was undertaken in the interest of debentureholders, that it met with their wholehearted support and that they will be in control of the new company.

The fact, however, is that the reorganization was initiated by the Waters family, undertaken in the interest of the Waters family, and that the Waters family will be in control of the new company. A great many debentureholders were opposed to the reorganization but were coerced into it.

On October 7th, 1931 (R., 110) there were deposited under the plan $8,763,000.00 principal amount of debentures. There were at that time outstanding principal amount $10,673,000.00 and holders of $1,890,000.00 objected to the plan and refused to deposit thereunder. Upwards of $851,000.00 of these debentures were deposited with the Protective Committee which sold out to the Reorganization Committee for the sum of $35,000.00 (Main Brief, pp. 8-9); the others showed their disapproval of the plan by refusing to deposit with either committee.

What is therefore quite plain is that the Reorganization Committee, by their suit, accomplished what they set out to do; they had coerced into subjection to the plan all bondholders except a few, who now appeal to this Court for relief.

As to control of the new company, that will be vested not in the debentureholders, but in the Waters family. Evidence of that fact is contained in the statement which appeared in the November 28th, 1931, minutes of the Reorganization Committee (R., 520):

"* * * It was the sense of the meeting that said Board of Directors (of the new company) should consist of twelve members, one of whom would be Mr. Frank B. Cahn and that the remaining members should be persons satisfactory to Mr. Waters and of his nomination, to the extent that circumstances did not require the inclusion of any others."

IV.

Original lack of jurisdiction was not cured by the intervention of Bankers Trust Company.

The statement in the brief of Bankers Trust Company (p. 5) that its petition of intervention—after recovery of judgment—might be regarded as an original creditor's bill and thus the original lack of jurisdiction be cured, is erroneous. In our Main Brief (p. 35) we pointed out that such a contention is untenable under the rule in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491.

A similar contention was made and overruled by this Court in *United States ex rel. Texas Portland Cement Company* v. *McCord*, 233 U. S. 157. In that case this Court said at page 163:

"* * * These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit. No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. *As we read the certificate, the intervention was what it*

purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit.'' (Italics ours.)

V.

The contention of the respondents, Reorganization Committee, that the original lack of jurisdiction was cured by the alleged subsequent insolvency of the National Radiator Corporation is not tenable either in fact or in law.

The respondents, Reorganization Committee, seek to sustain the jurisdiction on the ground (Brief, p. 11):

> ''* * * that by February 1, 1932 and ever thereafter, the Corporation was in fact utterly insolvent in every sense of the word;''

That contention is not tenable either in fact or in law.

First, the company was not insolvent on February 1st, 1932. Even at that date it had in cash alone more than enough with which to pay the debts which it had permitted to accumulate. The assumption of insolvency proceeds from errors of arithmetic (supra, pp. 5-6). Nor is there any proof of insolvency at any time thereafter. That assumption is wholly gratuitous.

But if, **for the sake of argument,** we say that at some time after the appointment of the receivers the company would or did reach the point where the cash was insufficient to pay all the obligations which had been permitted to accumulate, isn't it probable that if no receivers had been appointed and no accumulation had been permitted, that that condition could have been avoided? Receivership is not the least expensive nor the most efficient method of doing business and a company in the process of reorganization is not most profitable.

A comparison of the condition of the company for the period from December 31, 1930, to June 30, 1932, may be more convincing upon that point than argument. During the first nine months of that period the company was not in receivership; during the latter ten months it was.

The financial statement of the company on December 31, 1930 (which was the last before the receivership), showed current assets at $5,054,007.37 (R., 34). A statement prepared by the receivers showing the condition of the company as of October 8th, 1931 (R., 402) one day prior to their appointment, showed current assets at $4,939,727.54 (R., 521-522, Main Brief, p. 12), a shrinkage of current assets during that nine months' period of only $114,279.76. That was due solely to the unusually heavy reserve of $179,046.79 for bad debts; a reserve in excess of 10% of $1,673,373.59 of notes and accounts receivable, whereas the previous rate charged for such reserve was only 3% (R., 208; 210; 211). If the usual deduction for such reserve had been made, the company would have shown no shrinkage of current assets whatsoever.

The receivers entered into possession on October 9th, 1931, and on January 2nd, 1932 (R., 82) they rendered a report for the period from October 9th, 1931, to and including November 30th, 1931 (R., 85). That report showed an operating profit of $31,817.44, before depreciation on plants, etc. (which, of course would not affect current assets), and a loss of $14,630.44 after an allowance of $46,548.21 as an expense for the maintenance of non-operating plants (R., 85).

The receivers' statement of current assets as of December 31, 1931 (R., 257-258, Main Brief, p. 18) shows a drop of current assets to $4,423,705.25, a shrinkage in current assets of $516,022.29, although the months of October, November and December are the best months in that line of business (R., 233-238).

Equally interesting is the receivers' statement of current assets on June 30th, 1932 (R., 523). That statement shows current assets at $3,883,847.23, a further shrinkage of $539,858.02.

No explanation for the dwindling of current assets of upwards of $1,000,000.00 during the ten months of operation by the receivers is contained in the Record (R., 404). The entire shrinkage of over $1,000,000.00 (before depreciation and before interest on debentures) cannot be attributed to losses. Over $500,000.00 of that shrinkage occurred between October 9th and December 31, 1931, and for two of those months the operating loss after an allowance of expenses for carrying idle plants, was only about $14,000.00 (R., 85). It is inconceivable that a loss of $500,000.00 was sustained in December, 1931.

Perhaps there had been an undervaluation of current assets; perhaps the reserves which were set up were too high.

In any event the receivers were not as successful in the operation of the company as were the company's own management. At least, that was the contention made by the respondents. They objected to a stay of the transfer of title to the new company pending appeal on the ground "that this delay to the estate would be approximately $50,000.00 a month" (R., 402). It was their contention that transacting business through receivership imposed additional hardships upon the corporation which, translated into money, amounted to $50,000.00 a month.

But despite the impediments of receivership, the accumulation of interest, the unexplained shrinkage of current assets, the corporation on August 8th, 1932, the day of the sale, could have paid the $1,440,882.08* of accumulated and unpaid interest upon the outstanding

*Figure taken from Respondents' Brief, page 3.

debentures out of the approximately $1,551,615.78 then in its possession (R., 401-402) and still have had more than $100,000.00 with which to transact business.

Secondly, the respondents' proposition is not tenable in law.

In *American Bonding & Trust Co. v. Gibson County*, 145 Fed. 871, Lurton, C. J. (later Mr. Justice), says at page 874:

> "Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the non-existence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit. * * *"

See also:

Hollingsworth v. *Flint*, 101 U. S. 591.

The case of *Brown* v. *Lake Superior Iron Company*, 134 U. S. 530, cited by the respondents does not support their contention. In that case, the corporation was insolvent and upon bill filed by some of its creditors, acquiesced in the appointment of receivers. Nine months after the appointment it prayed for a dismissal of the bill on the ground that the plaintiffs had complete and adequate remedies at law.

This Court in that case held that jurisdiction of the subject matter of the suit existed and that by acquiescing in the appointment of receivers, it had waived the right to that defense.

In that case this Court said at page 536:

> "* * * This matter has recently been before this court, in *Reynes* v. *Dumont*, 130 U. S. 354, 395, and was carefully considered, and the rule, with its limitations, thus stated: 'The rule as stated in 1 Daniell's Chancery Practice, 555, 4th Am. ed., is, that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defend-

ant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are cited to establish that 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. *The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter.*' • • • It was held in *Lewis* v. *Cocks*, 23 Wall. 466, that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings, nor suggested by counsel.' • • •" (Italics ours.)

In the case at bar, the objection to the jurisdiction is made not by the debtor corporation but by creditors who protest that the judgment is collusive and that the court never had jurisdiction of the subject matter of the suit and ask that as to them it be adjudged a nullity.

International Life Insurance Company v. *Sherman*, 262 U. S. 346.

Conclusion.

We have not been able to find, nor have the respondents referred us to a single case in which a receiver was appointed of a corporation which was not insolvent within either one or the other of the definitions of insolvency. In all cases which we have found or the respondents have cited, either the corporation was insolvent within the

definition of the Bankruptcy Act or else it was hopelessly unable to meet and pay its debts as they matured in regular course.

It is our contention that a court of equity may not take jurisdiction of a going solvent corporation for the purpose of reorganizing it, even though its operation is unprofitable. We do not deny to the corporation and to assenting creditors the right to reorganize such a corporation. But we contend that reorganization should be and can be only without prejudice to the rights of non-assenting creditors and without fraud upon them.

Such reorganization is binding upon those who assent thereto but not upon others.

Canada Southern Railway Company v. *Gebhard*, 109 U. S. 527.

Gilfillan v. *Union Canal Company*, 109 U. S. 402.

It is not our purpose nor desire to disrupt the reorganization. We merely ask that it be declared not binding as to those who have not assented thereto.

We therefore respectfully submit that the decrees of the Circuit Court of Appeals and of the District Court should be reversed and adjudged void as to creditors and debentureholders who have not assented to the plan of reorganization.

Respectfully submitted,

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of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1933

No. 64

AMY ARZT and JOSEPHINE RAMSEY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al., etc.*

PETITIONERS' SUPPLEMENTAL REPLY BRIEF

The petitioners have served and filed a reply brief in this cause. The reply brief was addressed to the brief of the respondent Bankers Trust Company and to a brief of the respondents Reorganization Committee served on us on November 2, 1933.

On November 6, 1933—after our reply brief had been printed, but before it was served—we received by mail a revised brief served on behalf of respondents Reorganization Committee in which they revised pages 3, 4, 5 and 11 of their first brief, which they have withdrawn.

It therefore becomes necessary that we explain to this Court that the excerpts in our reply brief (pp. 5, 7, 12, 14) from pages 3, 5 and 11 of the brief of Reorganization Committee are from the first and unrevised brief.

We wish also at this time to correct certain statements

contained in the revised brief. The statement on page 3 of that brief:

> "In substance, this was an averment of the defendant's imminent insolvency and the Record shows that when Receivers were appointed the defendant's cash was but little in excess of its current liabilities totaling $1,035,000 (R. 499), and its overdue sinking fund obligation of $32,068.50."

is incorrect. The statement at page 499 of the Record, shows the condition of the Company on September 30, 1931. The liabilities of the Company on October 9, 1931, when the Receivers were appointed, are set forth in the decree (R. 294, 295) and are accurately stated on page 13 of our Main Brief and page 6 of our Reply Brief.

Equally incorrect is the following statement on page 5 of the revised brief:

> "As shown above, at the date of receivership (adopting petitioner's own method of crediting to sinking fund $158,000 of treasury Debentures canceled after receivership), the defendant was indebted for accrued interest and sinking fund and other current liabilities to a total of $1,067,068.50. Had this amount been paid, it would have left cash of only $190,313,—not $400,000 (13)."

That statement is founded upon the erroneous premise that on October 9, 1931, the current liabilities, exclusive of sinking fund obligation were $1,035,000.

We also wish to call to the attention of this Court, that besides cash there were other current assets such as accounts receivable and inventory which were readily reducible to cash.

CONCLUSION

We have in our Main Brief and in our Reply Brief accurately set forth the condition of the Company at various times during the Receivership and prior thereto. In all

cases of conflict in figures between the Reorganization Committee and ourselves, a reference to the pages in the record cited by us will convince the Court of our absolute correctness.

Respectfully submitted,

DAVID M. PALLEY,
of New York, N. Y.

CHARLES H. SACHS,
LOUIS CAPLAN,
of Pittsburgh, Pa.,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 964.

AMY ARZT and JOSEPHINE RAMSEY,
Petitioners,

against

RUDOLPH B. FLERSHEM, et al., as Reorganization Committee, etc., BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION (Delaware), NATIONAL RADIATOR CORPORATION (Maryland), ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers, etc., and CARL E. RESLEY and G. FRANKLIN LUDINGTON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS AND FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for the Respondents.

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Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported, but printed copies have been filed with the Record. The opinions of the District Court are not yet reported, but appear at pages 416 and 691 of the Record.

Jurisdiction.

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347a).

Introductory Statement.

The present petition is one of three applications by holders of approximately 2% in aggregate of the total outstanding indebtedness of National Radiator Corporation for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Third Circuit filed March 24, 1933, affirming a final decree of sale and the decree confirming the sale of the property of the debtor corporation, in a suit instituted in the United States District Court for the Western District of Pennsylvania by the respondents as holders, under a Reorganization Plan, of more than 95% of the total outstanding indebtedness of said corporation. The two other applications are entitled, respectively, "First National Bank of Cincinnati and International Heater Company, Petitioners, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and others, Respondents," at Nos. 962-963, and "Lily Clapier, Petitioner, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and National Radiator Corporation, Respondents," at No. 965. In the latter application counsel for the present petitioners presents through a dependent suit substantially the same questions presented here.

Since 1928, the continued decline in residential building (R. 208), which utilized the greater part of the debtor's product (R. 207), had resulted in losses for the debtor cor-

poration of around $1,250,000 or $1,300,000 a year (R. 209), reflected in the market quotations for the debtor's outstanding Debentures which by the middle of 1930 were quoted at 20 and reached a low of 14 in the latter part of that year (R. 205). With such losses, it was apparent that, if interest and sinking fund charges amounting to $1,107,852 a year were continued, it was only a matter of a short time before all cash resources of the debtor would be utterly exhausted; insolvency in every sense of the word was inevitable; and, at the time the bill was filed, was imminent. The imminency of insolvency has been fully proved by the subsequent events. By February 1932, the debtor was insolvent in every sense of the word.

That the debtor's predicament was fully appreciated by the public interested in its securities is also shown by the market quotations alluded to. Although the debtor corporation did actually default in the payment of interest February 1, 1931 (R. 49), for more than eight months, until October, receivership — always a costly and detrimental proceeding — was avoided because of the ready acceptance which the Reorganization Plan met from the overwhelming majority of creditors (R. 516-517 et seq.). Receivership ultimately occurred, with the appointment of receivers October 9, 1931 (R. 95), because actions at law had been brought in New York and others were threatened on behalf of the real parties in interest represented by these petitioners (R. 594), to procure preferential payment of their coupons. The verified bill of complaint of the respondents Reorganization Committee properly and correctly stated that the defendant debtor had no means at hand "with which to meet, pay or satisfy the interest charges on the Debentures overdue as aforesaid, without

seriously jeopardizing the ability of the defendant to continue its business and without making it difficult or impossible for the defendant to secure necessary supplies, materials and labor to continue the operation of its plants and the sale of its products" (R. 16) and that the appointment of receivers was imperative, to prevent "a multiplicity of suits, a race of diligence, wasteful strife and controversy" (R. 17). Upon these jurisdictional grounds rested the District Court's decree appointing receivers (R. 95).

After their appointment, the receivers filed their first report, accompanied by an inventory of 235 pages, listing in minutest detail the debtor's assets (R. 122).

In January 1932, at the application of solicitors for the respondents (complainants below), in accordance with the accepted practice in the United States District Courts, a day was set for the final hearing on the bill and answer, the entry of a decree of sale of the debtor's property and the taking of testimony to fix an upset price (R. 673). This hearing was set for March 3, 1932, of which due notice was given to all parties of record (R. 670). Bankers Trust Company, as Trustee and judgment creditor for the sum of $11,674,240.21 (R. 432, 433), in respect of the principal and interest of the debtor's outstanding Debentures, had intervened January 9 (R. 141); The First National Bank of Cincinnati intervened March 3 (R. 155); and International Heater Company intervened March 31, 1932 (R. 200). Counsel for the petitioners attended this hearing but entered no appearance. At this hearing, voluminous testimony was taken of the appraisal and liquidating values of the debtor's property and of the wisdom and propriety of entering a decree of sale (R. 203, etc.). Both receivers testified at length and, exercising their proper function,

fully informed the Court as to the nature and value of the debtor's property which was in their custody. At the conclusion of this hearing the District Court took under advisement the entry of the decree of sale and after three months of further deliberation, on May 31, 1932, entered a decree directing the sale of the debtor's property (R. 420), with upset price fixed at $2,500,000 (R. 451). This sale was duly advertised and held and came on for confirmation at a further hearing on August 18, 1932, when the petitioners, then having intervened to oppose confirmation of such sale and to object to the terms of the Reorganization Plan (R. 722, 727), were heard (R. 579). The decree confirming the sale, from which they now appeal, was entered September 8, 1932 (R. 692).

The petitioners do not assert that the upset price fixed in the decree of sale was not fair or that the purchase price bid for the debtor's property was not adequate or that at the time of sale the debtor was able to pay its debts then due or was solvent in any sense of the word or that the sale of the debtor's property was not proper by way of equitable execution in satisfaction of such debts. Their petition questions neither the adequacy of the sale price nor the fairness of the Reorganization Plan, but the right of the District Court to have exercised jurisdiction (whether in the appointment of receivers in the first instance or in directing a sale of the debtor's property is not clear), because on the day the District Court took jurisdiction the debtor was solvent.

Whether the debtor was solvent or insolvent, in the sense of having assets in excess of liabilities, at the time of receivership, is primarily a question of fact. In the opinion of the District Court, $2,500,000 was considered

to reasonably represent "a minimum price for the properties of the defendant at which a sale of them might be confirmed" (R. 419). The Circuit Court of Appeals, after a study of the voluminous record in the Court below, said:

> "We have at much labor studied and absorbed this record. A recital of the mass of facts and figures would add nothing to the decision of the case. It will be sufficient to say that, notwithstanding what on first view is a startling disparity between book values and market values, we cannot find on the evidence that the learned judge erred in naming the price in the order of sale. If the upset price of $2,500,000 reflected the fair market value of the assets, we cannot find on the assignment charging error in confirming the sale that the purchase price of $2,550,000 was inadequate. At this figure, the purchase price was two per cent. above the upset price and ten per cent. above the highest price the evidence indicated as likely to be realized in liquidation.
>
> "The assignments charging error in the order of sale and the order of confirmation are dismissed."

The petitioners' assertion of a capital structure of $16,000,000 for the New Company is without support in the Record, since all shares of the New Company are without par value (R. 56) and the book value accorded the new Income Debentures has only remote relevancy in a valuation of the assets acquired by the New Company. Of no greater relevancy to a determination of the value of the debtor's assets is the 1927 book value of the debtor's outstanding securities. Even the book value attributed by the petitioners to the debtor's assets is not disclosed by the Record, for what are said to have been $18,000,000 of assets,

includes over $6,600,000 for good will (R. 782), over $6,300,000 for plants and equipment, as appraised *at replacement cost* as of December 31, 1926 (R. 368), less depreciation and increased by subsequent net additions at actual cost (shown to be salable on liquidation at not above $500,000) (R. 233) and other items of investment in affiliated companies and deferred charges. Cash was not "almost $2,000,000", but in fact 21% less, including Government certificates of indebtedness at cost (R. 782). The testimony showed that a substantial amount of this cash would be utilized in liquidating the debtor's slow assets (R. 234, 343, 383).

The $10,673,000 principal amount of the debtor's outstanding Debentures have been matured and are due and payable (R. 436), in accordance with their terms (which permit the acceleration of the maturity thereof after default in the payment of interest thereon (R. 36-37)). Interest and sinking fund charges alone overdue and unpaid on those Debentures amount to more than $2,600,000 (R. 35).

ARGUMENT.

The petitioners have not a vested right to preferential payment.

The real contention of the petitioners is that they should have been permitted to obtain the debtor's cash, leaving to other creditors the opportunity to take over the debtor's plants and slow assets. It would be regrettable were creditors unable to obtain equitable relief from the depredations of others until their common debtor has been denuded of

all current assets or at least cash or cash equivalent. Fortunately, such is not the law.

Michigan v. *Michigan Trust Co., Receiver* (1932), 286 U. S. 334;

In re Babcock (C. C. A. 7th Cir., 1928), 26 Fed. (2d) 153;

Kingsport Press, Inc. v. *Brief English Systems, Inc.* (C. C. A. 2nd Cir., 1931), 54 Fed. (2d) 497.

In the case last cited a consent receivership instituted by a number of creditors (situated as are the respondents' Reorganization Committee) and contested by a judgment creditor, who at the time of appointment of receivers was about to levy execution against the defendant's property, was sustained in an opinion of the Circuit Court of Appeals for the Second Circuit, delivered by Judge A. N. Hand, saying in part (at p. 501 of the Reporter):

> "The contention that the appointment was obtained by collusion is based on a confusion of ideas. It seems to be thought that it was illegal for the defendant to inform the complainant that Owen was ready to issue execution or to take any steps that would facilitate a receivership. We can discover nothing illegal in this. Owen had no vested right to prevent other creditors from being paid if an administration of the property of the defendant through an equity receivership would produce such a result though after some inconvenience and delay to himself."

From that decision, petition for writ of certiorari was denied, in (1931) 283 U. S. 858. It was cited with approval by this Court in

Shapiro v. *Wilgus* (1932), 287 U. S. 348, at 356.

In the instant case the receivership to all intents and purposes is concluded. The decree appointing receivers has been supplanted by the decree of sale and the decree confirming the sale of the debtor's property for the benefit of all creditors. Thus, this is precisely the type of equity proceeding which had Mr. Justice Cardozo's approval when he said:

> "It is one thing for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380. Whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary." *Shapiro* v. *Wilgus* (1932), 287 U. S. 348, at 356.

The alternative urged by the petitioners would result in the recovery only by themselves, and those similarly minded, of payment in full of their claims, "while other creditors might have to go begging", as Judge Hand remarked.

The petitioners' entire argument rests upon their assertion that the debtor corporation is, or, at least, was, solvent and able to pay in full in cash its debts presently due and payable. Such in fact is far from the case. But even had the debtor been solvent at the time of its receivership, that fact would not have deprived the District Court of jurisdiction.

Superior Oil Corporation v. *Matlock* (C. C. A. 10th Cir., 1931), 47 Fed. (2d) 993;
Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265.

In the latter case Judge Learned Hand found that the defendant was solvent, but said (at page 269 of the Report):

> "While it is necessary to allege that the assets, if given no protection, will not be enough to pay all creditors, it is not necessary to allege that the corporation is presently insolvent, or even that, when properly managed, it will not have a surplus for distribution among stockholders; and for that reason it is not customary to allege insolvency, though it is customary more clearly than in the bill in suit to allege that the assets will not pay all, if abandoned to general waste by separate legal proceedings. Such bills may, of course, be abused by the collusion of the debtor and friendly creditors. They may be abused by the court's refusal to allow a present liquidation, disregarding the creditors' unqualified right to present payment, and preserving the property for the debtor, which is not entitled to more consideration than its creditors collectively think wise to give it. But that has nothing to do with the propriety of the bills as such; they form a necessary and important part of insolvency law, and are of unquestioned validity."

In the instant case the District Court, in its final decree of sale entered May 31, 1932, found that it had jurisdiction over all the parties to this cause and the subject matter (R. 420). In reviewing the decrees of the District Court, the Circuit Court of Appeals, in respect of the same questions now presented by the petitioners, rendered its opinion, stating in part:

> "The appellants' attack on the jurisdiction of the court to entertain the bill, appoint receivers and order a sale of assets as an entirety is disclosed by the three questions they have presented:

"(1) 'May a federal court of equity, in the absence of other equitable grounds, take jurisdiction of a foreign corporation which is solvent and able, in regular course, to pay its obligations in full, for the primary purpose of reorganizing it?'

"(2) 'May a federal court of equity, in the absence of other equitable grounds, and solely for the purpose of reorganizing a corporation which is not insolvent nor in imminence of insolvency appoint receivers to take possession of such corporation's property until it can be sold?'

"The plain answer to these questions is 'no'.

"The phrase 'in the absence of other equitable grounds' compels this answer because it excludes the essence of the court's jurisdiction in such matters. It is the presence of equitable grounds calling for relief in equity which gives the court jurisdiction. A court of equity is not a forum of convenience to be used by a corporation merely to straighten out its business difficulties or to rebuild its financial structure. Nor is it a place of refuge to which debtors may go for protection against their creditors and against the remedies of suit, judgment, execution and sale which the law affords them. Debtor corporations are not wards of chancery. There is nothing in the mere fact of a corporation's indebtedness, nor in its inability to pay, nor in its wish to make some composition with its creditors that confers equitable jurisdiction upon a court. It is only when there is something in a situation which sets up an equitable right and admits of equitable relief that parties may go into a court of equity and assert one and obtain the other. Common instances are where a corporation is insolvent or where its insolvency is imminent. Even in the latter case the right of a federal court of equity (cautiously exer-

cised) to appoint receivers at the instance of simple contract creditors if the debtor corporation consents, is not, as one of the appellants admits, debatable. *Michigan* v. *Michigan Trust Company,* 286 U. S. 334; *Shapiro* v. *Wilgus,* 287 U. S., p. 348.

"The appellants' third question, however, contains no nullifying exceptions and goes directly to the point. It is:

> "(3) 'Does the bill of complaint in the primary cause set forth facts sufficient to constitute a cause of action for the appointment of receivers or for other equitable relief?'

"The bill must, as we have stated, have equity, and equity will not lie in the mere fact, if such were the case, that the corporation could not pay interest. Here the corporation could presently pay, but payment foretold imminent consequences disastrous to the corporation and, what is more to the point, disastrous to its securityholders. Plainly those consequences were insolvency with its attendant evils to all concerned. The fact that the corporation had in hand sufficient money to meet certain current indebtedness did not alter the underlying conditions. *Continental & Commercial T. & S. Bank* v. *Allis-Chalmers Co.,* 200 Fed. 600, 613; *In re Babcock,* 26 Fed. (2d) 153. The facts of the situation, showing, as we find, imminence of insolvency and collapse, calling for protection of creditors, constituted a ground of equity for which relief could validly be asked by simple contract creditors within the law of *The Pusey & Jones Company* v. *Hanssen,* 261 U. S. 491 and within the warning of *Shapiro* v. *Wilgus,* 287 U. S., p. 348. The case therefore falls within the rule distinguished and succinctly stated by Judge Learned Hand in *Luhrig Colleries Co.* v. *Interstate Coal & Dock Co.,* 281 Fed. 265, 268, 269."

The fact that the Plan of Reorganization had been issued prior to the receivership presents no element of novelty in the instant case. Nor does the fact that the debtor's board of directors had in principle approved some form of reorganization. The normal eventual result of practically every equity receivership of a large corporation is reorganization. Every corporation which admits the allegations of the conventional creditors' bill and consents to the appointment of receivers knows that it is, in effect, consenting to a reorganization, which presumably will be dictated by its creditors and will involve a scaling down of fixed charges. In the ordinary case, it is true, the plan of reorganization has not been promulgated or even formulated at the time the creditors' bill is filed. The plan is always promulgated, however, before the entry of a final decree. It happens that in the instant case the Plan of Reorganization was promulgated before the creditors' bill was filed — but what possible bearing has this on the jurisdictional sufficiency of the creditors' bill? Is it conceivable that a general creditors' bill, which in the ordinary case would meet every test of legal sufficiency, becomes fatally defective simply because, prior to its filing, the overwhelming majority of the creditors have announced that they plan to effect a reorganization? In refutation of this suggestion, it is pertinent to quote the following language from the opinion of Judge Hough in *Conley* v. *International Pump Co.* (S. D. N. Y., 1915), 237 Fed. 286, at 288:

> "It is certainly a curious conception of practice which leads a small body of shareholders to seek to answer a foreclosure bill merely because they are dissatisfied with what the foreclosing complainant says out of court it hopes or even intends to do after the final decree is procured."

In the instant case, there has not been an abuse of jurisdiction, but an exercise of the orderly and equitable procedure established by an unbroken line of decisions of this Court. The petitioners' attempt must fail, to find in this case an analogy to the case of *Shapiro* v. *Wilgus*. In that case the defendant corporation was organized and one creditor brought suit for the sole purpose of holding the defendant's other creditors at bay. In the instant case, creditors holding more than 95% in amount of the defendant's indebtedness, not only in their own behalf but on behalf of all creditors similarly situated, instituted the receivership proceeding, to which the debtor consented, not as a means of holding creditors at bay, but as a voluntary surrender of possession of all of its property to judicially appointed custodians who could administer the same for the benefit of all creditors.

As among creditors of the same class, the petitioners have not a vested right to preferential payment. They may, with all other creditors, share in the ratable distribution of the net proceeds of the sale of the debtor's property. Or, if they believe the debtor's property to have potential worth not reflected by the purchase price thereof, since they do not assert that the Reorganization Plan is unfair as to them, they may unite in the reorganization and obtain the securities of the New Company, which in their market quotations should reflect the current value of the debtor's property, which the New Company acquires. They have in their petition advanced no reason, however, why they should fare better than all the other creditors of National Radiator Corporation, whose claims are not discharged "in full, in cash", in this receivership.

CONCLUSION.

The petition for writ of certiorari should be dismissed with cost.

Respectfully submitted,

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,

Counsel for Respondents RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

FILED
MAY 25 1933
CHARLES ELMORE CROPLEY
CLERK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

NO. 464.

AMY ARZT and JOSEPHINE RAMSEY,
Petitioners
(Appellants Below),

v.

RUDOLPH B. FLEISCHEM, et al., as Reorganization Committee, etc., BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION, Delaware, NATIONAL RADIATOR CORPORATION, Maryland, ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers, etc., and CARL E. RESLEY and G. FRANKLIN LUDINGTON,
Respondents
(Appellees Below).

BRIEF FOR BANKERS TRUST COMPANY AS TRUSTEE IN OPPOSITION TO THE PETITION OF AMY ARZT AND JOSEPHINE RAMSEY FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

NO. 964.

AMY ARZT and JOSEPHINE RAMSEY,

Petitioners
(*Appellants Below*)

v.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee Constituted Under the Plan and Agreement, Dated February 11, 1931, for the Reorganization of National Radiator Corporation, BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION, Delaware, NATIONAL RADIATOR CORPORATION, Maryland, ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers of National Radiator Corporation, Delaware, and CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents
(*Appellees Below*),

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER COMPANY and EDWARD J. RAMSEY,

Respondents
(*Appellants Below*).

BRIEF FOR BANKERS TRUST COMPANY AS TRUSTEE IN OPPOSITION TO THE PETITION OF AMY ARZT AND JOSEPHINE RAMSEY FOR A WRIT OF CERTIORARI.

As appears from the petition and the brief in support thereof, this Respondent is Trustee of the issue of

debentures of National Radiator Corporation, of which $10,673,000 face amount are outstanding. (Record pp. 128 and 164). At the request of the Reorganization Committee as holders of substantially all of the issue, this Respondent intervened in the receivership in the District Court, by leave of that Court obtained a judgment against National Radiator Corporation for the amount of the outstanding debentures with interest and prayed for the sale of the property. (Record pp. 128, 136 and 137). The legal position of this Respondent as Intervenor in the receivership cause in the District Court is not assailed. What is attacked is the jurisdiction of the District Court over the receivership as such and the propriety of the action of the District Court in appointing receivers upon the bill of complaint of the Reorganization Committee as filed. The fairness of the Plan of Reorganization is not apparently seriously attacked. (Petition pp. 15 and 16).

The brief of the Reorganization Committee deals adequately and in detail with the technical aspects of the jurisdictional question. This respondent desires, therefore, merely to state that in its opinion, this Court should determine upon this record that the District Court not only had jurisdiction of the parties and the subject matter, but exercised that jurisdiction with propriety and within the principles laid down by this Court in the cases cited by Petitioners. (Petition P. 16). With the evident desire of an overwhelming majority of the debentureholders, whom this Respondent represents, to accomplish a reorganization along the lines laid down in the Plan, this Trustee cannot but sympathize. It appearing that this receivership was instituted in order to obtain a judicial determination of the rights of the debentureholders and other creditors and a judicial sale of the debtor's property, this Respondent has no

hesitation in stating to this Court that in its opinion, the jurisdiction of the District Court was properly invoked for that purpose and for the essential conservation of the assets of the National Radiator Corporation pending that determination. Such, it seems to us was the essential purpose of this receivership—a purpose with which we think this Court cannot but approve.

A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 64

AMY ARZT AND JOSEPHINE RAMSEY,
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.,
Respondents.

BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONERS ARZT AND RAMSEY.

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for Respondents Reorganization Committee.

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Statute

U. S. Judicial Code, Section 240a 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 64

AMY ARZT AND JOSEPHINE RAMSEY,
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.,
Respondents.

BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONERS ARTZ AND RAMSEY.

Opinions of the Courts Below

The opinion of the District Court filed simultaneously with the entry of the final decree of sale is printed at pages 280-283 of the printed Transcript of Record. The opinion of the District Court filed in connection with the decree confirming sale is printed at page 463 of the Record. Neither of these opinions has been published. The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 64 Federal Reporter (2d Series) at page 847, *et seq.*, and appears in the printed Transcript of Record at pages 534-544.

Jurisdiction

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229; § 1, 43 Stat. 938 (28 U. S. C. A., § 347a).

Corrections of Statements in the Petitioners' Brief

There occur in the petitioners' brief some of the errors of statement appearing in the briefs of other petitioners in this cause.* The jurisdiction of the District Court was invoked, it is said (*3*), "solely for the purpose of effectuating a reorganization of the company in order to scale its funded debt and to coerce non-assenting Debentureholders into subjection to the Plan or else to wipe them out" (*3*). This is both a misleading and a too inclusive statement. The purpose of the Reorganization Plan itself was admittedly to adjust to the exigencies of the case the fixed charges which burdened the enterprise. But the Plan was offered for the voluntary acceptance of securityholders and the Committee have at no time had the intent either to coerce non-assenting Debentureholders into subjection to the Plan or to wipe them out. Moreover, the creditors' bill filed by the Committee with the District Court was for the primary purpose, as it expressly stated, of preventing dissipation and waste of the Corporation's property by execution sales, irrespective of whether or not any reorganization were ever consummated, because, as the petitioners' brief elsewhere states (*12*), through the petitioners' counsel actions at law had been instituted and were then threatened "by non-assenting Debentureholders" on their interest coupons. The creditors' bill, in addition to alleging the foregoing, averred also that the defendant Corporation had no means

*References by figures in italics being to pages of the petitioners' brief.

at hand with which to meet the interest charges overdue on its Debentures, without seriously jeopardizing the ability of the defendant to continue in business and without making it difficult or impossible for the defendant to continue the operation of its plants and the sale of its products (R. 11). In substance, this was an averment of the defendant's imminent insolvency and the Record shows that when Receivers were appointed the defendant's cash was but little in excess of its current liabilities totaling $1,035,000 (R. 499), and its overdue sinking fund obligation of $32,068.50. **With the forthcoming maturity on December 31, 1931 of a $20,000 note held by International Heater Company (R. 132) and the forthcoming maturity on February 1, 1932 of another installment of Debenture interest and sinking fund amounting to $554,868, the Corporation faced complete insolvency in every sense of the word.** This suit was brought, therefore, on the ground, among others, of the defendant's imminent insolvency (*3*). When the District Court later entered its confirmatory decree, there was before it the June 30, 1932 balance sheet (R. 523, 524), showing accrued Debenture interest of $1,325,257.90, together with other current liabilities, all aggregating $1,556,793.41. In addition, $24,200 was owing International Heater Company on one past due note (R. 132). These liabilities (*exclusive of sinking fund installments in arrears since August 1, 1931*) amounted to more than the entire cash working capital of the Corporation.

The Corporation's default in the payment of Debenture interest February 1, 1931 was to conserve cash in order that business operations might continue (R. 501). It was not a part of a plan to reorganize (*5*), since at that time no plan of reorganization had been formulated.

The decision of the directors was first and primarily,

that the best interests of everyone, including Debentureholders, would be served if interest payments were discontinued, so that working capital might be conserved. The fact is, and is plainly stated in the Reorganization Plan, that the Corporation omitted payment of interest on its Debentures because its management was firmly convinced that liquidation of the Corporation would prove disastrous to creditors and that its cash must be conserved, if the enterprise were to be continued as a going concern. Of course, the directors' decision to omit payment of Debenture interest as a means of continuing the business entailed the decision that the capital structure should be reorganized, but it is not true, as petitioners suggest, that the interest payment was omitted to bring about reorganization. Reorganization was not an end in itself, it was recommended by the directors only as a means of salvaging the maximum value of the assets for creditors. The Reorganization Committee was "inaugurated" by the Corporation, but it is not accurate to say that it was "acting in behalf of the company" (*6*). The Corporation's management merely asked the members of the Reorganization Committee to serve as such, but they have acted primarily on behalf of the creditors.

The Reorganization Plan decidedly is not "in the interest of the company" (*6*), since it practically wipes out all stockholders and wipes out completely common stockholders, with the exception of a potential interest extended them in the form of option warrants, for which they must pay $1 each and which merely give the right to buy shares of new common stock at $20 per share (R. 40, 41). The Reorganization Plan does not discriminate "against Debentureholders in favor of other creditors of equal rank", merely because the New Company assumes the payment of approximately $40,000 of merchandise claims.

It is not true that the Plan places the value of $100 a share upon the new preferred stock (*8*). The new preferred stock is **without par value** and the amount to which it is entitled on liquidation is merely the measure of its priority over the common stock (R. 39).

It is not true that a valuation of $20 per share is placed upon the new common stock "in the scheme of reorganization". (*8*). This new common stock **will be without par value**, and $20 is nothing but the option price at which it may be purchased at some time in the future (R. 40). Were the value of the new common stock $20 per share, the value of the new securities given to Debentureholders would be $1,400 for every $1,000 of present Debentures. The suggestion of petitioners (*8*) that the capital of the reorganized Corporation will be some $16,000,000 is wholly unwarranted.

As shown above, at the date of receivership (adopting petitioner's own method of crediting to sinking fund $158,000 of treasury Debentures canceled after receivership), the defendant was indebted for accrued interest and sinking fund and other current liabilities to a total of $1,067,068.50. Had this amount been paid, it would have left cash of only $190,313,—not $400,000 (*13*).

The subsequent intervention of Bankers Trust Company, as Trustee, was at the request of holders of more than 90% of the Corporation's Debentures (*14*) (R. 112-114). These Debentureholders were creditors to the extent of more than $9,000,000. It happened that one of these creditors was connected with the Corporation's management, but he was the holder of more than $1,000,000 principal amount of these Debentures (R. 444) and by the terms of the Reorganization Plan under which his Debentures were deposited, his interest as a stockholder of the Corporation was virtually wiped out. With these incontrovertible

facts in mind, it is thus not accurate to say that "those who were responsible for the default in the payment of the interest" were using that default "as the pretext for declaring the Debentures due" (*15*). Those who were responsible for the default were the directors of the Corporation. Those who declared the Debentures due were the holders of over 90% of the Debentures.

In our brief in the companion cases at Nos. 62 and 63, we have had occasion to point out that the testimony offered the District Court as to the value of the defendant's properties was the most expert and responsible that could have been obtained. It could in no way have been characterized as a matter of "notions" (*17*). The properties themselves sold for $2,550,000, approximately 22% of the face amount of the Corporation's outstanding debt. It is submitted that under present-day conditions, with a business which like almost every business today engaged in the building trade is operating without profit, this represents a very substantial price and considerably higher than the percentage of return which stockholders in comparable businesses could receive today through a sale of their shares.

It is not true that merchandise and service creditors are to be paid in full "out of the proceeds" of the sale under the decree entered by the District Court (*20*). **There is absolutely nothing in the decree relating to the payment of merchandise and service creditors.** Under the decree, all creditors will share in the net proceeds of the sale as may hereafter be provided in the order of distribution of the District Court (R. 310), and of course the District Court will direct that all general creditors share *pro rata*. It is the Plan of Reorganization, not the decree of sale, which provides that "the new Company will assume and agree to

pay in full all the liabilities of the Corporation for taxes, wages, services and merchandise * * *" (R. 37).

It is not true that the Circuit Court of Appeals sustained the exercise of jurisdiction by the District Court on the ground of "possible future insolvency" (*21*). The opinion of WOOLLEY, C. J., which is quoted on page 22 of the petitioners' brief, said that payment of interest *"foretold imminent consequences disastrous to the Corporation"* and that *"plainly those consequences were insolvency with its attendant evils to all concerned."*

Summary of Argument

The brief of petitioners is replete with evidences of complete misapprehension as to the nature and effect of the Plan of Reorganization itself; and petitioners' argument is based in large part upon this misapprehension. It therefore seems necessary that our argument be devoted in large part to an analysis of the petitioners' theory of this case and to a refutation of the fallacies upon which it is based. Apparently petitioners entertain the notion that this Plan of Reorganization is of benefit to the Corporation and that the Corporation will be better off after the reorganization than before. Illustrative of petitioners' misconceptions in this regard are the following statements appearing on the below indicated pages of petitioners' brief:

> "Courts of equity are not sanctuaries to which solvent corporations may flee for refuge from their creditors." (*30*)
>
> "The sale was employed as a device to effect a transposition of the assets from the old company to the new, in order to free the National Radiator Corporation from the obligations to Debentureholders who refused to assent to the Plan of Reorganization." (*39*)

"Nor may he (the debtor) demand that, upon payment of the present liquidation value of his assets, he be released from his debts and that he be permitted to retain those assets free from all future liabilities and obligations." (*44*)

"In the instant case, the Court's power of sale was employed * * * to enable the debtor to retain possession of its property, free from the obligation to its creditors." (*47*)

"Jurisdiction was assumed * * * merely to enable the Corporation, through reorganization, to scale its funded debt." (*47*)

"The Court, through the exercise of its jurisdiction, took the property of the non-assenting Debentureholders and quite gratuitously gave it to the Corporation." (*49*)

"Courts of equity may not by judicial process transfer the property of one corporation to another having the same stockholders." (*49*)

"* * * The appeal was made to the Court to employ its power of sale and distribution as a subterfuge in order to accomplish the transfer, to the National Radiator Corporation, disguised in the form of a new corporation, of all its business, property and assets as a going concern * * *." (*51*)

Petitioners seem to believe that National Radiator Corporation, the insolvent debtor, is to continue in existence unscathed and rejuvenated by the reorganization and that it will commence a new life with its debts commuted and released and its properties freed from the claims of creditors. This, of course, is absolutely contrary to the fact. The fact is, that it is the purpose of the Plan of Reorganization, and it is the necessary effect of this suit and of the decrees already entered, that the old National Radiator Corporation shall, to all intents and purposes,

be absolutely and finally wiped out, and all its property taken from it. Upon the consummation of the Plan of Reorganization, **the whole enterprise will be owned and controlled by the old Corporation's creditors**, except for the minor interest in the equity which is given preferred stockholders. The Corporation will not be permitted to retain any assets. The New Company is not the old National Radiator Corporation "disguised in the form of a new corporation". It is a brand new company with entirely different stockholders, who are the creditors of the old Corporation.

The old Corporation's debts will not be released through the medium of the reorganization or through the decrees entered in this suit. True, all its property has been taken from it for the benefit of its creditors and therefore it is physically incapable of making any further payments on its debts. It is only a shell. However, creditors cannot hope, by any device, to get anything more than all the Corporation's assets.

It is utterly misleading to say that the Corporation is fleeing for refuge from its creditors. On the contrary, it has surrendered all its property unconditionally to a court of equity to be administered equitably for the benefit of all its creditors. At this point, it is fair to observe that nine months elapsed after the Corporation's default in Debenture interest before the Corporation even "fled for refuge from its creditors"; and during that entire period these petitioners were under no restraint whatsoever from asserting the legal rights which they now seek to exercise.

This suit really represents a two years' effort on the part of the great body of creditors to take over the corporate property for themselves. Their efforts have not been

opposed by the Corporation, but strenuous resistance has come from a few creditors. Except for the obstruction by these few creditors, the overwhelming majority of the creditors would long ago have taken over all of the corporate assets; they would have been in control of the management, and they would constitute the New Company. These few creditors are unwilling for some reason to retain their *pro rata* interest in the corporate enterprise by accepting securities of the New Company, even though these new securities would give them more than the same aliquot share in the enterprise which they now possess. These petitioners argue that they would prefer to remain as creditors of the old Corporation, notwithstanding it is utterly insolvent and would necessarily be a bankrupt if this suit were dismissed. Their fellow petitioners in the companion cases at Nos. 62 and 63 at least urge that their debts be enforced through liquidation of the enterprise, but these petitioners do not want the property of this insolvent Corporation to be administered by a court of equity at all. They urge that the property be returned to the Corporation, so that they may have an opportunity, freed from judicial restraint, to prey upon it, through the enforcement of their asserted Constitutional rights to secure judgment at law and to levy execution. No creditor has a vested right to such preferential payment.

Kingsport Press, Inc. v. *Brief English Systems, Inc.* (C. C. A., 2nd Cir., 1931), 54 Fed. (2d) 497.

Respondents submit:

I. This suit was properly brought to enforce the rights of all creditors against the debtor Corporation.

II. The exercise of jurisdiction in this suit by the District Court did not violate the Fifth Amendment of the Constitution of the United States.

ARGUMENT

I.

This suit was properly brought to enforce the rights of all creditors against the debtor Corporation.

It is perfectly clear from the Record, and it was so found by the District Court and the Circuit Court of Appeals, that the defendant Corporation, at the time this suit was instituted, was faced with imminent insolvency; and it is well settled that a creditors' bill in equity is properly brought under these circumstances, even though the defendant debtor is not technically insolvent at the time.

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265;

In re Babcock (C. C. A., 7th Cir., 1928), 26 Fed. (2d) 153;

Brassey v. *N. Y. & New Eng. R. Co.* (D. Conn., 1884), 19 Fed. 663.

Petitioners contend that the imminence of the insolvency was not alleged with sufficient certitude in the bill of complaint. Their version of the allegations of the complaint is that it forecast only a possible insolvency and they say this renders the whole proceeding defective and the two decrees erroneous. However, the fact is that by June 30, 1932 and ever thereafter, the Corporation was in fact utterly insolvent in every sense of the word (R. 523, 524); and we submit that this is the all important circumstance now before this Court and that the District Court should not now be divested of jurisdiction over this suit for some fancied imperfection in the original bill of complaint.

Brown v. *Lake Superior Iron Co.* (1890), 134 U. S. 530.

So far as concerns the charge of collusion made in petitioners' brief, this charge has been made many times and has invariably been disposed of, in the absence of evidence of actual fraud, by an unbroken line of decisions, holding that a consent receivership, merely because it is a consent receivership, is not fraudulently collusive.

In re Metropolitan Railway Receivership (1908), 208 U. S. 90.

All of the cases, such as *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, cited in petitioners'-brief, for the proposition that a court of equity does not have the power to seize the assets of a corporation simply because of its mere refusal to pay its debts, are cases where the debtor opposed the suit and consequently these cases have no bearing on the instant case, because in the instant case the Corporation made no objection, but admitted the allegations of the bill and consented to the appointment of Receivers and the Court therefore had undoubted jurisdiction.

In re Metropolitan Railway Receivership (1908), 208 U. S. 90;

Horn v. *Pere Marquette R. Co.* (E. D. Mich., S. D., 1907), 151 Fed. 626;

Burton v. *R. G. Peters Salt & Lumber Co.* (W. D. Mich., S. D., 1911), 190 Fed. 262;

In re Babcock (C. C. A., 7th Cir., 1928), 26 Fed. (2d) 153;

Kingsport Press, Inc. v. *Brief English Systems, Inc.* (C. C. A., 2nd Cir., 1931), 54 Fed. (2d) 497.

So far as concerns the statement in petitioners' brief that no controversy existed between the Reorganization Committee and National Radiator Corporation, the fact is that the latter owed a debt to the former which had not

been paid, and in the *Metropolitan Railway Receivership* case it was held that this state of facts presented a controversy sufficient to give the court jurisdiction to entertain a creditors' bill and to appoint receivers.

The petitioners' brief concludes with the charge that this cause was instituted for the purpose of effecting a reorganization of the National Radiator Corporation in accordance with the Plan, as though, in this fact alone, there was something heinous. The authorities cited in the petitioners' brief, however, all dealt with attempts to accomplish some inequitable reorganization. But where, as in the instant case, equity jurisdiction has properly been exercised to conserve and sell the assets of a failing enterprise for the benefit of all its creditors, we submit that the existence of a plan of reorganization, outlining what the creditors propose to do with those assets, if they acquire them, has no bearing upon the jurisdictional sufficiency or the propriety of their creditors' bill. It does not seem conceivable that a creditors' bill, which in the ordinary case would meet every test of legal sufficiency, becomes fatally defective simply because prior to its filing the complainants or the overwhelming majority of its creditors have announced that they intend to effect a reorganization and have promulgated a plan. Most equity receiverships of large industrial corporations ultimately result in reorganization, because the creditors have no alternative but to buy in their debtor's assets. Unless they could do so and unless they could plan to do so, most insolvent corporations, once in the hands of the courts, would have to remain there.

The Plan of Reorganization itself was not formulated or promulgated or approved by the debtor Corporation. This suit was not a scheme to coerce non-assenting Deben-

tureholders into the Plan or else to wipe out their rights under the Debentures. All Debentureholders were offered equal treatment and this opportunity is still open to the petitioners. If Debentureholders do not wish to participate in the Plan, they are entitled to receive in cash their fair distributive share of the net proceeds of the sale of their debtor's assets. But it does not follow that they had a right to say that these assets should not be sold. Obviously the assets did not suffice to pay all creditors in full and this suit was a proper and usual method to secure fair treatment to all creditors of the Corporation. In an analogous situation, presented in the case of *Simon* v. *New Orleans, T. & M. R. Co.* (C. C. A., 5th Cir., 1917), 242 Fed. 62, the Court said:

> "Furthermore it is apparent that the organization of the committee is not a combination against the petitioner, for he was invited to join it more than two years ago, and this course is still open to him. If the combination is highly advantageous to those engaging in it, the petitioner may have all of these advantages by complying with the same conditions."

These petitioners do not want reorganization and they say they are being deprived of their rights by this suit which will give them in cash their fair distributive share of the Corporation's properties. These petitioners apparently think that nothing at all should have been done, although all other creditors who have studied the situation (including the petitioners in the companion cases at Nos. 62 and 63, who assert that the Corporation was a "demonstrated failure") are definitely of the opinion that there are only two possible courses: reorganization or liquidation.

The practical result of petitioners' argument is, that creditors would have no equitable redress against their debtor until it has bled itself white in paying all its debts as they mature, notwithstanding the consequences of such a course would be detrimental to the great body of creditors who were unable through actions at law or otherwise to obtain priority of payment. It is true that some corporations, even after they see the handwriting on the wall, in an effort to defer as long as possible the stigma of receivership or bankruptcy will continue to pay maturing obligations as long as they have any cash available for the purpose, even though such a course may eventually prove disastrous to the creditors themselves. The ultimate consequence is that, when the cash is gone and the situation crashes and bankruptcy or receivership ensues, there is no money left to carry on the business and unless new money can be found, which is practically impossible in these times, the property must, of necessity, be liquidated at sacrifice prices. There remains for the greater number of creditors a residue of frozen assets. It frequently happens that there is not enough left to pay taxes, prior liens and the costs and expenses of liquidation in bankruptcy. Everyone loses.

II.

The exercise of jurisdiction in this suit by the District Court did not violate the Fifth Amendment of the Constitution of the United States.

We have argued that jurisdiction of this suit was properly entertained by the District Court under established usages and principles of equity, and that neither this suit

nor the Plan of Reorganization will deprive the petitioners of any of their vested rights in any property of the Corporation. Judicial proceedings which accord with those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights are due process of law.

Pennoyer v. *Neff* (1887), 95 U. S. 714.

As stated in the opinion of this Court in *Shapiro* v. *Wilgus* (1932), 287 U. S. 348, when a creditor invokes the aid of equity to conserve a common fund for the benefit of himself and of the creditors at large, "*whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary*".

CONCLUSION

The decrees of the courts below should be affirmed.

Respectfully submitted,

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for Respondents Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933.

No. 64.

AMY ARZT and JOSEPHINE RAMSEY
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY, AS TRUSTEE.

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THE BALLOU PRESS NEW YORK

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IN THE

Supreme Court of the United States,

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AMY ARZT and JOSEPHINE RAMSEY,
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

No. 64.

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY, AS TRUSTEE.

Preliminary Statement.

Respondent Bankers Trust Company is trustee of an issue of debentures of National Radiator Corporation, $10,673,000 principal amount of which are outstanding, all issued under an indenture dated August 1, 1927 (R. 108). More than $10,188,500 of the debentures are deposited with the Respondent Reorganization Committee (R. 293). The Petitioners in this case claim to hold $121,000 principal amount of such debentures. As such trustee this Respondent intervened in the creditors' suit pending in the District Court, prayed for and obtained judgment for the principal amount of the outstanding debentures with interest, and prayed for the sale of the assets of the defendant company.

Petitioners attack, first, the jurisdiction of the District Court to appoint receivers upon the bill of complaint of the Reorganization Committee, though the defendant company consented to such appointment, and, second, the action of

the District Court in having entered the decree of sale and in approving the Plan of Reorganization.

This brief will be devoted primarily to the question of the jurisdiction of the District Court to order a sale pursuant to the prayer of the bill of intervention of Bankers Trust Company as trustee. The brief for the Petitioners in this case raises incidental points with respect to the Plan of Reorganization, the form of the decree of sale, and the adequacy of the price. These we have deemed it better to discuss in the companion cases, Nos. 62 and 63, upon the petition of First National Bank of Cincinnati and International Heater Company.

It is perhaps desirable here, however, to take brief issue with some of the statements contained in the Petitioners' brief with respect to the part played by Bankers Trust Company in the reorganization.

1. It is stated in Petitioners' brief (p. 5) that the Reorganization Committee "with the approval of Bankers Trust Company, the trustee of the debentures, decided as part of the plan to reorganize not to pay the installment of interest which would become due February 1, 1931". The implication is that the Trustee gave such approval and thus committed a breach of trust. Bankers Trust Company was not only trustee for all the debentures. It held as a banking institution some $1,040,000 principal amount. Naturally, therefore, it was consulted about the plan (R. 417).

With the decision not to pay interest the Trustee had no part. That was a matter of business judgment for the Board of Directors of the Company, upon which the Trustee was not represented. It gave no approval of the default.

2. At pages 11 and 12 of the brief, it is argued that the intervention of Bankers Trust Company as Trustee to obtain a judgment for the amount of the outstanding interest coupons and later for the principal of the debentures was "to enable the National Radiator Corporation to plead that

judgment as a bar to suits for interest by non-assenting debentureholders". The implication again is that such action was in derogation of Petitioners' rights. The indenture under which the debentures were issued specifically provides that the Trustee shall, upon the happening of an event of default, be entitled to sue and to take judgment. Further than this, the Trustee is required, when instructed by the holders of one-fourth in principal amount of outstanding debentures, to institute such suit (R. 28). Such instructions were given (R. 111), and the Trustee acted, as a logical step in the enforcement of a past due debt. The indenture further provides that any moneys collected by the Trustee after the payment of costs and expenses shall be applied to the payment of "principal and interest, without preference or priority of principal over interest or of interest over principal * * * *ratably*" (R. 27). (Italics ours.) We submit that not only was it entirely proper for the Trustee upon the instructions so received to institute the suit, but that it was in duty bound to do so. If, incidentally, preferences among debenture holders were avoided, we see nothing reprehensible in the fact.

3. At pages 15 to 17 of Petitioners' brief, the participation of this Respondent in the affairs of the Company is again attacked. We submit that its position as Trustee for a large majority of the creditors of defendant company, apart from its interest as a creditor on its own behalf, entitled it to be consulted as it was.

POINT I.

The District Court had jurisdiction to order the sale.

The question of the jurisdiction of the District Court to appoint receivers and the propriety of its so doing upon the bill of complaint of the Reorganiation Committee will, we take it, be fully discussed in the brief of that Committee. This discussion will be restricted, therefore, to the jurisdiction of the Court under the intervening bill of this Respondent as Trustee. On October 5, 1931, the bill of complaint of the Reorganiation Committee was filed (R. 6). On October 9, 1931, the defendant filed its answer and consented to the appointment of receivers (R. 63). On October 13, 1931, the Respondent Trustee obtained an order permitting it to institute suit to recover interest on the debentures outstanding (R. 71). Thereafter at the direction of holders of more than 25% in principal amount of the Debentures outstanding the Respondent, in conformity with the provisions of the indenture (R. 25), declared due the principal of the Debenture and, again with leave of court, (R. 80) obtained judgment for such principal. On January 9, 1932, Bankers Trust Company as Trustee obtained on order allowing it to intervene as party plaintiff and to file its intervening bill praying for enforcement of its judgment for the principal amount of the outstanding debentures (R. 93). It is submitted that, regardless of what the jurisdictional situation may have been on October 9, 1931, it was the duty of this Trustee, when instructed by a large majority of its debenture holders to sue for the interest and principal of their debt. Receivers having already been appointed for the debtor and its properties being already in the control of the District Court, the only proper manner by which the Trustee might proceed to enforce its judgment against the defendant was through intervention in the receivership cause. The receivership being then con-

tinued at the request of Bankers Trust Company, as such judgment creditor, any possible question as to the jurisdiction of the District Court was thereafter removed.

Regardless of the then pending receivership, the District Court had jurisdiction to entertain the Trustee's suit upon the independent ground of diversity of citizenship and the amount in controversy. The Trustee's judgment alone would have constituted independent ground for the appointment of receivers under principles settled by this Court in the very cases which Petitioners cite. Thus, in *Pusey-Jones Co.* v. *Hanssen,* 261 U. S. 491, which is the cornerstone of Petitioners' argument, Mr. Justice Brandeis, after pointing out that while a simple contract creditor has, in the absence of statute, no substantive right to the appointment of a receiver, said:

> "after execution upon a judgment recovered at law has been returned unsatisfied he may proceed in equity by a creditor's bill", citing *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, and further "He (the judgment creditor) may, by such a bill, remove any obstacle to satisfying his execution at law; or may reach assets equitable in their nature; *or he may provisionally protect his debtor's property from misappropriation or waste by means either of an injunction or a receiver*". (Italics ours.)

The property being, regardless of the validity of the appointment of the original receivers, in the custody of the District Court, the issuance of execution and its return unsatisfied would have been an empty gesture. The Respondent Trustee therefore filed at once what was in effect its creditors' bill, and in its intervening petition applied for a marshalling and sale of the assets as the final relief and *the appointment of receivers as an incident thereto* (R. 85-92). Similar action in the ancillary proceedings immediately followed (R. 116), and receivers were appointed under what was in effect a judgment creditors' bill, and were thus in possession of the entire assets of the defendant company. That receivership was necessary to preserve those assets pend-

ing the final relief prayed for is, we think, self-evident on this Record. The properties consisted of industrial plants, machinery and chattels appurtenant thereto. They were operated as a going business. To permit individual creditors, whether or not debenture holders, to levy executions upon such property and to disrupt it pending a final determination of the respective rights of all would clearly have been wasteful and destructive of the rights of the vast majority of creditors.

CONCLUSION.

We think that we have conclusively demonstrated here that, regardless of any fancied invalidity in the action of the District Court in appointing receivers upon the bill of complaint of the Reorganization Committee, it clearly had the power to appoint them upon the intervening petition of the Respondent Trustee, and that it exercised that power in the only way practicable for the protection of the obvious best interest of the creditors of the defendant company as a whole.

The decrees should be affirmed in all respects.

Respectfully submitted,

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Counsel for Bankers Trust Company, Trustee.

CARLOS L. ISRAELS,
On the Brief.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 65

LILY CLAPIER, PETITIONER,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA.

Docket Entries

Dec. 11, 1931.—Bill of Complaint filed, subpœna issued.

Jan. 13, 1932.—Subpœna returned served on Carl E. Resley, Treasurer of the National Radiator Corporation at Pittsburgh, Pa., on December 30, 1931. Served on an adult member of the family of John H. Waters at Southmont, Johnstown, Pa., on January 5, 1932.

Jan. 19, 1932.—Præcipe for appearance of Reed, Smith, Shaw & McClay for Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, filed.

Jan. 19, 1932.—Motion of Rudolph B. Flershem, Charles O. Cornell, John H. Waters, and Frank B. Cahn, to dismiss the Bill of Complaint filed.

Jan. 19, 1932.—Præcipe for special appearance of H. S. Endsley for National Radiator Corporation filed.

Jan. 19. 1932.—Motion of National Radiator Corporation to dismiss the Bill of Complaint filed.

Mar. 29, 1932.—Plaintiff's motion for stay of all proceedings at No. 2558 Equity pending final determination of this case filed.

May 31, 1932.—Opinion and decree dismissing the bill filed and entered.

July 5, 1932.—Exception noted to Decree, upon request of counsel for plaintiff.

[fol. 2] July 12, 1932.—On petition of plaintiff, order entered allowing an appeal.

July 12, 1932.—Assignments of Error filed.

July 13, 1932.—Citation issued, returnable Aug. 12, 1932.

July 21, 1932.—Bond on appeal approved and filed.

July 25, 1932.—Præcipe for record on appeal filed.

July 28, 1932.—Appellee's præcipe for record on appeal filed.

IN UNITED STATES DISTRICT COURT.

In Equity. No. 2597

BILL OF COMPLAINT—Filed Dec. 11, 1931

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, sitting in equity:

The complainant, Lily Clapier, brings this bill of complaint on behalf of herself and on behalf of all other creditors of the defendant, National Radiator Corporation, who are opposed to, and have refused to accept the Plan and Agreement dated February 11, 1931 for the reorganization of the National Radiator Corporation, and alleges as follows:

First. The complainant Lily Clapier, is a resident and citizen of the State of New York.

Second. This complainant alleges upon information and belief that the defendants, Rudolph B. Flershem, Charles O. Cornell, are residents and citizens of the State of New [fol. 3] York; the defendant, John H. Waters, is a citizen of the State of Pennsylvania; and the defendant, Frank B. Cahn, is a resident and citizen of the State of Maryland; and the defendant, National Radiator Corporation is a corporation duly organized under the laws of the State of Delaware, and a citizen and resident of that State.

Third. This complainant was and now is the legal owner and holder of Eleven Thousand Dollars ($11,000), aggregate principal amount of the debentures of the defendant, National Radiator Corporation referred to in the certain Bill of Complaint described in Paragraph "Fourth" of this Bill of Complaint, all payable to bearer, to each of which bonds are attached all coupons appurtenant thereto including the coupons, each in the sum of $32.50, which became due and payable on the 1st day of February, 1931, and the 1st day of August, 1931, and by reason thereof, the complainant, is, therefore, a creditor of the defendant, National Radiator Corporation, in the sum of Eleven Thousand Seven Hundred and Fifteen Dollars ($11,715), with interest upon the sum of Three Hundred Fifty-seven Dollars and Fifty Cents ($357.50), part thereof from the 1st day of

February, 1931, and upon the sum of Three Hundred Fifty-seven Dollars and Fifty Cents ($357.50), part thereof from the 1st day of August, 1931.

Fourth. This complainant further alleges upon information and belief that on or about the 9th day of October, 1931, a bill of complaint was duly filed in the District Court of the United States for the Western District of Pennsyl- [fol. 4] vania by the defendants, Rudolph B. Flershem, Charles O. Cornell, John H. Waters, and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, as complainants, against the defendant, National Radiator Corporation, as defendant, a copy of which Bill of Complaint is hereto annexed, marked Schedule "A" and made part of this Bill of Complaint.

Fifth. This complainant, however, does not annex to this Bill of Complaint Schedule "A," a copy of the Indenture, and Schedule "B," a copy of the Plan and Agreement, which are annexed to said Bill of Complaint, and which are, as already stated, duly filed in this Court, but this complainant prays leave to refer to the said Bill of Complaint and Schedules "A" and "B" thereto annexed, with the same force and effect as if herein set forth at length.

Sixth. This complainant further alleges upon information and belief that simultaneously with the filing of said Bill of Complaint, the defendant, National Radiator Corporation, as defendant in said cause duly appeared and filed its answer therein admitting the allegations of the Bill of Complaint and consenting to the relief prayed for therein; a copy of which answer is hereto annexed, made part hereof and marked Schedule "B."

Seventh. This complainant further alleges upon information and belief that thereupon this Court upon said Bill of Complaint and said Answer, duly entered and recorded a [fol. 5] decree in said cause, a copy of which decree is hereto annexed and made part hereof and marked Schedule "C."

Eighth. This complainant further alleges upon information and belief that said decree is erroneous and improper on the face of the record in said cause and ought to be re-

viewed, reversed, and set aside for many apparent reasons and imperfections including the following:

(a) Because the Bill of Complaint upon which the decree was rendered does not state facts sufficient to constitute any cause of action in Equity or does it set forth any grounds to authorize the exercise of any jurisdiction in equity in behalf of said complainants or either or any of them by way of the appointment of receivers or other equitable relief.

(b) Because in so far as said complainants or either or any of them have any cause of action or ground for complaint or redress in reference to any of the matters or things alleged in said Bill of Complaint, they and each of them have perfect and complete remedies at law, and therefore, have no right to any equitable relief by way of the appointment of receivers or otherwise.

(c) Because the rendering and recording of the decree upon the Bill of Complaint in said cause deprives this complainant and other holders of debentures of the defendant, National Radiator Corporation, who are opposed to and refuse to accept the Plan and Agreement referred to in said Bill of Complaint, of their property without due process of law, in violation of and in contravention of Article V of [fol. 6] the Articles of Amendment of the Constitution of the United States.

(d) Because the rendering and recording of the decree upon the Bill of Complaint in said cause deprives this complainant and other holders of debentures of the defendant, National Radiator Corporation, who are opposed to and refuse to accept the Plan and Agreement referred to in said Bill of Complaint in said cause, of their rights under the provisions of Article VII of the Articles of Amendment of the Constitution of the United States.

(e) Because the defaults in the payment of interest were wilful and deliberate and wholly unnecessary and were part of a collusive scheme to delay, hinder, obstruct, and deprive this complainant and other holders of debentures who are opposed to and have refused to accept the Plan and Agreement referred to in said Bill of Complaint, of their lawful contract rights under and by virtue of the debentures of the defendant, National Radiator Corporation.

(f) Because the appointment of the receivers in said cause was without the duly authorized consent of said defendant, National Radiator Corporation.

Ninth. This complainant further alleges upon information and belief that no decree should have been rendered in said cause, but that said Bill of Complaint should have been dismissed.

Tenth. This complainant has no adequate remedy at law and can have relief only in equity, and, therefore, files this [fols. 7 & 8] bill of complaint on behalf of herself and on behalf of all other creditors of the defendant, National Radiator Corporation, who are opposed to and have refused to accept the Plan and Agreement dated February 11, 1931, for the Reorganization of the defendant, National Radiator Corporation, and who may come in and contribute to the expenses of this cause.

In consideration whereof, this complainant prays that the decree entered and recorded in the other cause be reviewed, reversed, vacated, and set aside, and no further proceedings taken thereon. To the end, therefore, that the defendants may show cause why this complainant should not have the relief prayed for, this complainant prays that a subpoena be directed to said defendants commanding them at a certain time to show cause why said decree should not be reviewed, reversed, vacated, and set aside as prayed for.

Lily Clapier, by Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Her Solicitors.

Duly sworn to by Lily Clapier. Jurat omitted in printing.

[fol. 9] SCHEDULE "A" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

against

NATIONAL RADIATOR CORPORATION, Defendant

Bill of Complaint

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, sitting in equity:

The complainants, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, bring this their Bill of Complaint against National Radiator Corporation on their own behalf and on behalf of all other creditors of the defendant who may join in the prosecution of this suit, and allege upon information and belief as follows:

[fol. 10] First. The complainants, Rudolph B. Flershem and Charles O. Cornell, are residents and citizens of the State of New York; the complainant, John H. Waters, is a resident and citizen of the State of Pennsylvania; and the complainant, Frank B. Cahn, is a resident and citizen of the State of Maryland.

Second. The defendant, National Radiator Corporation, is a corporation duly organized and existing under the laws of the State of Delaware, and a citizen and resident of said State. The principal office of the defendant is in the City of Johnstown, in the Commonwealth of Pennsylvania, in the Western District of Pennsylvania, and a substantial part of the properties owned by the defendant is located in said Western District of Pennsylvania, including two manufacturing plants in said City of Johnstown, a

manufacturing plant in the City of New Castle and other properties and assets.

Third. The ground upon which the jurisdiction of this Court depends in this suit is the diversity of citizenship of the plaintiffs and of the defendant, and the matter in controversy in this suit is in excess of the sum of $5,000 exclusive of interest, costs and expenses. This suit is brought for the purpose of enforcing the claim of the complainants against the defendant; for the determination of the claims of the creditors of the defendant; and for the sale of the assets of the defendant and the distribution of the net proceeds of said assets among the creditors of the defendant in accordance with their respective rights and for the other relief hereinafter prayed.

[fol. 11] Fourth. Shortly before August 30, 1927, the defendant duly authorized an issue of its 6½% Sinking Fund Gold Debentures (hereinafter called the "Debentures") in the aggregate principal amount of $16,000,000. The Debentures are coupon debentures in denominations of $1000 and $500 dated August 1, 1927, payable August 1, 1947, and bear interest from August 1, 1927, at the rate of 6½% per annum, payable semi-annually on the 1st days of February and August in each year, upon the presentation and surrender of the interest coupons thereto attached and are in the form or substantially the form set forth in the Indenture hereinafter mentioned. For the purpose of setting forth the terms and provisions governing the issue of the Debentures and appurtenant coupons and the rights and remedies of the holders thereof on or about August 30, 1927, the defendant duly made and executed under its corporate seal and delivered to Bankers Trust Company, a corporation of the State of New York, as Trustee, its Indenture dated August 1, 1927 (hereinafter called the "Indenture"). At the time of the execution and delivery of the Indenture, Bankers Trust Company was duly authorized and empowered to act as Trustee thereunder and duly accepted the trusts under the Indenture and united in the execution of the Indenture. A copy of the Indenture is hereto annexed and marked "Schedule A" and made a part of this Bill of Complaint, and complainants pray leave to refer to the same with the same force and effect as if herein set forth at length.

The Indenture was and is the proper act and deed of the defendant, was by it duly authorized, made and delivered [fol. 12] in all respects in conformity with law and *and* remains in full force and effect.

Fifth. After the execution and delivery of the Indenture, and on or about August 30, 1927, the defendant duly executed $12,000,000 aggregate principal amount of Debentures with all appurtenant coupons in substantially the form provided by the Indenture and said Bankers Trust Company, as Trustee, authenticated the same and delivered them to or upon the order of the defendant, all in accordance with the provisions of the Indenture.

Sixth. Thereafter the defendant duly negotiated and sold for value and issued to numerous bona fide purchasers thereof said $12,000,000 aggregate principal amount of Debentures with all coupons for interest thereunto appertaining. Of the Debentures so issued, $1,169,000 principal amount have been delivered by the defendant from time to time since the execution of the Indenture and prior to the verification of this Bill of Complaint to said Bankers Trust Company, as Trustee, for cancellation in lieu of the semi-annual Sinking Fund payments provided for in the Indenture, and the Debentures so delivered have been cancelled by said Bankers Trust Company, all as provided in the Indenture.

Seventh. Of the Debentures issued as aforesaid, $126,000 principal amount have been purchased and acquired by the defendant and are now held in its treasury. At the date hereof $10,705,000 principal amount of said Debentures are [fol. 13] outstanding in the hands of divers persons who are the owners and holders thereof for value and said Debentures are now in all respects valid and outstanding obligations of the defendant.

Eighth. On February 1, 1931, the defendant made default in payment of the interest then falling due on all said Debentures issued and outstanding as aforesaid although the coupons or some thereof appurtenant to said Debentures were duly presented for payment and payment duly demanded.

Ninth. On or about February 11, 1931, the complainants, Rudolph B. Flershem, Charles O. Cornell, and John H.

Waters, under a Plan and Agreement of Reorganization dated February 11, 1931 (hereinafter called the "Plan and Agreement") constituted themselves a Reorganization Committee for the purpose of effecting the reorganization of the defendant. A copy of the Plan and Agreement is hereto annexed and marked "Schedule B" and made a part of this Bill of Complaint, and complainants pray leave to refer to the same with the same force and effect as if herein set forth at length. On or about September 17, 1931, the complainant, Frank B. Cahn was duly elected a member of the Reorganization Committee as provided in Article 16 of the Reorganization Agreement with the effect in said Article 16 provided. The Plan and Agreement provides, among other things, that holders of said Debentures of the defendant may become parties to said Plan by depositing their Debentures with the February 1, 1931 and all subsequent coupons with Bankers Trust Company, as Depositary, and that such deposit of Debentures shall [fol. 14] transfer to and vest in the Reorganization Committee the legal title to such deposited Debentures and the coupons appertaining thereto. More than $8,736,000 principal amount of Debentures have been deposited with Bankers Trust Company, as Depositary under the Plan and Agreement, together with coupons for interest on said Debentures due on February 1, 1931, and all subsequent interest dates, and the complainants are now the holders and owners of said Debentures and said coupons.

Tenth. On August 1, 1931, the defendant made default in payment of the interest then falling due on all the Debentures issued and outstanding as aforesaid, although the coupons or some thereof appurtenant to said Debentures were duly presented for payment and payment duly demanded.

Eleventh. Shortly before the verification of this Bill of Complaint, the complainants, as the holders and owners of coupons representing interest on the Debentures due February 1, 1931, in the aggregate amount of not less than $283,920, and as the holders and owners of coupons representing interest on the Debentures due August 1, 1931, in the aggregate amount of not less than $283,920, duly presented all of said coupons for payment at the place specified for the payment thereof and duly demanded of the defend-

ant payment thereof in full and the defendant made, default in the payment of all of said coupons and the interest thereby represented and omitted and refused to pay the same or any part thereof, and the defendant is therefore at the date hereof indebted to the complainants on account [fol. 15] of said coupons and the interest thereby represented in an amount not less than $567,840, together with interest thereon, and no part of said sum has been paid and no bond or other security has been given for the payment thereof.

Twelfth. The defendant is engaged principally in the business of manufacturing and selling heating appliances, round and sectional boilers and hot water and steam radiators. The defendant owns manufacturing plants in the Cities of Johnstown and New Castle, Commonwealth of Pennsylvania, in the Western District of Pennsylvania; in the City of Trenton, State of New Jersey, in the District of New Jersey; in the City of Framingham, Commonwealth of Massachusetts, in the District of Massachusetts; in the Cities of Dunkirk and North Tonawanda, State of New York, in the Western District of New York; and in the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division. In all of the aforesaid places the defendant owns substantial amounts of property, including real estate, plants, mills and warehouses, and also stocks of raw materials, goods in process and finished goods. The defendant also owns warehouses in the City of Baltimore, State of Maryland, in the District of Maryland; in the City of Cincinnati, State of Ohio, in the Southern District of Ohio, Western Division; in Washington, D. C.; and in the City of Richmond, State of Virginia, in the Eastern District of Virginia; wherein are stored finished goods and other property of the defendant.

[fol. 16] Thirteenth. The defendant has no means at hand with which to meet, pay or satisfy the interest charges on the Debentures overdue as aforesaid, without seriously jeopardizing the ability of the defendant to continue its business and without making it difficult or impossible for the defendant to secure necessary supplies, materials and labor to continue the operation of its plants and the sale of its products. The defendant does business and has sales offices generally throughout the United

States; the sale of its products is dependent upon a feeling of confidence among its customers that its business will be continued so that repair parts will be available and servicing of its products will not cease. A large part of the property of the defendant consists of land, buildings, fixtures, plants, machinery, patterns and other equipment, trade-marks and patents which are not immediately available for the payment of the indebtedness of the defendant and cannot be levied upon or converted into cash or sold except as an entirety without great sacrifice. Certain of the properties of the defendant cannot be levied upon and sold in an action at law and said properties can be sold as an entirety and as a going concern only through the intervention of a court of equity.

Fourteenth. Certain holders of the Debentures not deposited with the complainants have threatened to bring suits in respect of interest due on their coupons and may levy execution upon the property of the defendant. An attempt by the complainants to enforce their claim as a [fol. 17] general creditor would precipitate immediate action on the part of other creditors of the defendant in different courts, and, unless this Court will take jurisdiction in this cause for the protection of every interest in the property and assets of the defendant, the result will be a multiplicity of suits, a race of diligence, wasteful strife and controversy; attempts will be made to obtain judgments and priorities; levies will be made upon the working capital, materials and supplies indispensable to the operation of the business of the defendant and this will result in the dismantling and dismemberment of its properties and will greatly interfere with and ultimately prevent the defendant from continuing to operate its properties, and will result in dissipating the administrative, technical and sales forces of the defendant, which cannot be reassembled without great cost, and in destroying the confidence of the customers of the defendant and the cancellation of many orders now on its books. The unity of the property of the defendant and its integrity as a whole, as now held and operated, the administrative, technical and sales organization and the good-will of its customers constitute most important elements of value, and to permit their severance and dissipation will result in ruinous sacrifice of every interest in said property, to the great loss and damage to

the complainants and other creditors of the defendant. It is to the best interests of the defendant and the complainants and other creditors of the defendant that the going concern value of the defendant's business and properties should be maintained, continued and kept intact for the benefit of all creditors, until all of the assets and business [fol. 18] of the defendant can be sold as an entirety, and the complainants believe that this can be accomplished and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a court of equity and the granting of equitable relief for the preservation of all of the property of the defendant as a going concern, and enjoining all creditors from interfering with or attempting to obtain any priorities and thus permitting a sale of all of the assets of the defendant for the benefit of all creditors.

Fifteenth. Complainants have no adequate remedy at law and no other previous application has been made for the relief herein sought.

In consideration whereof, and inasmuch as the complainants have no adequate remedy at law and can have relief only in equity, the complainants file this their Bill of Complaint, on behalf of the complainants and all other creditors of the defendant who may hereafter join in the prosecution of this suit, and pray for equitable relief as follows:

1. That the rights of the complainants and of other creditors of the defendant may be ascertained, decreed and determined; that this Court will fully administer the fund in which the complainants are interested, constituting all the property and assets of the defendant, in accordance with the rights, equities, liens and priorities, if any, existing thereon, and will enforce and decree the rights, equities, liens and priorities of the creditors of the defendant as the same finally may be ascertained and decreed by this Court.

[fol. 19] 2. That this Court, for the purpose of granting the relief prayed for and to protect the rights and interest of the complainants and of other creditors of the defendant, take over unto itself the jurisdiction and control of all the assets and property of the defendant of every kind and description whatsoever, and that pending this suit it grant such specific relief as from time to time may be expedient and appropriate to maintain such jurisdiction and control.

3. That, upon application by the complainants for the purpose of preserving the unity and integrity of the property and assets of the defendant and of preventing disruption thereof by separate executions, attachments and levies during the pendency of this suit, a receiver or receivers be appointed by this Court of the defendant and all of its property and assets, real, personal and mixed and of whatsoever kind and description and wheresoever situated, and all the tolls, earnings, rents, issues, profits, revenues and income thereof, with the usual powers of receivers in such cases, and with full power and authority to take possession of the plants, properties, real and personal, premises, easements, franchises, rights, privileges and interests of the defendant of whatsoever kind and character, and to manage and operate the same and to continue the business of the defendant and to collect and receive the tolls, earnings, issues, rents, profits, revenues and income thereof and every part thereof and to apply the same as this Court from time to time may order or decree; and that such further powers and [fol. 20] authority as to this Court may seem meet and proper may be granted by it to any receiver or receivers so appointed.

4. That the properties and assets and business of the defendant may be ordered to be sold as an entirety, with such exceptions and in such manner and upon such terms and conditions as this Court shall deem just and equitable, and that any such order shall make proper and suitable provisions for the protection of all equities, rights, priorities, claims and liens of the creditors of the defendant and shall provide for the sale of the property, assets and business of the defendant, subject to or free and clear from any and all liens or encumbrances, and that the proceeds of any such sale may be distributed by and under the direction of this Court among the creditors of the defendant and such others, if any, as this Court may adjudicate.

5. That pending this suit an injunction may issue out of and under the seal of this Court enjoining and restraining all creditors of the defendant from levying executions upon, attaching or intermeddling with or taking possession of any of the property and assets of the defendant.

6. That the complainants may have such other, further and different relief in the premises as to this Court may

seem proper and as may be necessary fully to protect and to enforce the rights and equities of the complainants and of all creditors of the defendant.

7. That a writ of subpœna may be granted to the complainants to be directed to the defendant, thereby requiring [fol. 21] said defendant to be and appear on a certain day before this Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree as to this Court shall seem meet.

Rudolph B. Flershem, Charles O. Cornell, John H. Waters, and Frank B. Cahn, the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, by Robert J. Dodds, Their Solicitor. Milbank, Tweed, Hope & Webb, Reed, Smith, Shaw & McClay, of Counsel.

Duly sworn to by Charles O. Cornell. Jurat omitted in printing.

[fol. 22]

SCHEDULE A

National Radiator Corporation
and
Bankers Trust Company, Trustee

Indenture Providing for an Issue of $16,000,000 Six and One-half per cent. Sinking Fund Gold Debentures.

Dated August 1, 1927

Indenture, dated the first day of August, 1927, between National Radiator Corporation, a corporation organized and existing under the laws of the State of Delaware, having its principal office at New York City, New York [fol. 23] (hereinafter called the Company), party of the first part, and Bankers Trust Company, a corporation organized and existing under the laws of the State of New York, having its principal office in the City of New York, New York (hereinafter sometimes called the Trustee), party of the second part.

Whereas, for the purpose of borrowing money for its lawful corporate purposes and of making payment for

properties necessary for the business of the Company, and in the exercise of the lawful powers in that behalf possessed by it, the Company has duly authorized and directed the issue of its debentures of the character hereinafter described, in the aggregate principal amount of $16,000,000, to be known as its "Six and One-Half Per Cent. Sinking Fund Gold Debentures" (hereinafter called the debentures), to be dated August 1, 1927, to mature on August 1, 1947 (unless called for previous redemption), to bear interest at the rate of six and one-half per centum (6½%) per annum from the first day of August, 1927, and in order to provide for the payment of the debentures and for the authentication thereof by the Trustee, and to establish and declare the terms and conditions upon which the debentures are to be issued, the Company has duly authorized and directed the execution and delivery of this Indenture; and

Whereas, pending, and in anticipation of, the preparation, execution and delivery of this Indenture, the Company has heretofore issued $1,935,000 principal amount of interim debentures as a part of the issue of debentures hereinabove referred to, which interim debentures are to be [fol. 24] replaced as hereinafter provided by debentures of the form herein described; and

Whereas, the debentures and the coupons to be attached thereto and the Trustee's certificate to be endorsed thereon are to be substantially in the following forms, with appropriate omissions, insertions and variations as by this Indenture permitted:

[Form of Debenture]

No. —. $ —.

United States of America,

State of Delaware

National Radiator Corporation Six and One-half Per Cent. Sinking Fund Gold Debenture

Due August 1, 1947

National Radiator Corporation, a corporation of the State of Delaware (hereinafter called the Company), for value received, hereby promises to pay to the bearer, or, if this debenture be registered, to the registered owner hereof on the first day of August, 1947, at the principal office of Bankers Trust Company or at the office of J. & W. Selig-

man & Co. in the Borough of Manhattan, The City and State of New York, or, at the option of the bearer or registered owner hereof, at the principal office of Continental and Commercial Trust and Savings Bank in Chicago, Illinois, the principal sum of — Dollars in gold coin of the [fol. 25] United States of America of or equal to the standard of weight and fineness existing August 1, 1927, and to pay interest thereon from the first day of August, 1927, at the rate of six and one-half per centum (6½%) per annum, in like gold coin, at any of said offices, semi-annually on the first days of February and August in each year until the payment of the principal sum hereof, but, up to the date of maturity hereof, only upon presentation and surrender of the interest coupons therefor hereto attached as they severally mature.

The interest on this debenture shall be paid without deduction for any Federal income tax (except such part thereof as may be in excess of two per cent (2%) per annum of such interest) which the Company or the Trustee under the Indenture hereinafter mentioned or any paying agent may be required or permitted to pay thereon or retain therefrom under any present or future law of the United States of America; which tax the Company agrees to pay, except as above mentioned. It is provided in said Indenture that the Company will reimburse the bearer, or, if this debenture be registered, the registered owner hereof, for any Pennsylvania or Connecticut personal property tax not exceeding four (4) mills per annum, or for any District of Columbia personal property tax not exceeding five (5) mills per annum, or for any Maryland securities tax not exceeding four and one-half (4½) mills per annum, which may be legally assessed against and paid by such bearer [fol. 26] or registered owner on each dollar of the principal amount or taxable value of this debenture, by reason of his ownership hereof, or for any income tax not in excess of six per centum (6%) per annum legally imposed by the Commonwealth of Massachusetts on account of the interest received hereon and paid by such bearer or registered owner, if application for any such reimbursement be made in writing to the Company as provided in the Indenture within sixty (60) days after payment of any such tax and in any event within six (6) months after such tax shall have become due and payable.

This debenture is one of a duly authorized issue of debentures of the Company, all of like date and tenor, except as to denominations, known as its "Six and One-half Per Cent Sinking Fund Gold Debentures", limited to an aggregate principal amount of $16,000,000, issued and to be issued under and pursuant to an Indenture (herein called the Indenture), dated August 1, 1927, executed and delivered by the Company to Bankers Trust Company (herein called the Trustee), as Trustee, to which Indenture reference is hereby made for a statement of the rights of the holders or registered owners of such debentures and coupons and of the Company and of the Trustee, and of the terms and conditions upon which the debentures are and are to be issued, received and held.

The debentures are subject to redemption, in whole, or in part by lot, at the option of the Company or from the [fol. 27] sinking fund hereinafter mentioned, on any interest payment date. Any redemption of debentures shall be upon at least forty (40) days' prior notice given by publication in a daily newspaper printed in the English language and published and of general circulation in the Borough of Manhattan, The City and State of New York, in the manner provided in the Indenture. The redemption price of any debentures redeemed as above provided shall be the principal amount of the debentures to be redeemed and accrued interest thereon to date of redemption, together with a premium calculated on the principal amount of the debentures to be redeemed as follows: seven and one-half per centum (7½%) if the date of redemption is on or before August 1, 1932, six per centum (6%) if the date of redemption is after August 1, 1932 and on or before August 1, 1937, four and one-half per centum (4½%) if the date of redemption is after August 1, 1937 and on or before August 1, 1942, and three per centum (3%) if the date of redemption is after August 1, 1942 and prior to the maturity date expressed in this debenture. From and after the date of redemption, interest on any debentures called for redemption shall cease, unless default shall be made in the redemption of such debentures on presentation. The debentures of this issue are entitled to the benefit of the sinking fund provided for in the Indenture, which sinking fund may be

paid by the Company in cash or in debentures or both as provided in the Indenture.

[fol. 28] In case an event of default, as defined in the Indenture, shall occur, the principal of all of the debentures issued thereunder and outstanding may become or be declared due and payable in the manner and with the effect provided in the Indenture.

As provided in the Indenture, debentures of the denomination of $1,000 or $500, at any time outstanding, when surrendered, and upon the payment of charges, may be exchanged for an equal aggregate principal amount of debentures of the other denomination, of numbers not contemporaneously outstanding.

This debenture is transferable by delivery unless registered as to principal in the name of owner at the office or agency of the Company in the Borough of Manhattan, The City and State of New York, such registration to be noted hereon. After such registration, no transfer hereof shall be valid unless made at said office or agency by the registered owner in person or by duly authorized attorney, and similarly noted hereon; but this debenture may be discharged from registration by being, in like manner, transferred to bearer; and thereupon transferability by delivery shall be restored, after which this debenture may again from time to time be registered or made transferable by delivery as before. Such registration, however, shall not affect the negotiability of the coupons hereto attached, which shall always continue to be payable to bearer and to be transferable by delivery merely.

[fol. 29] No recourse shall be had for the payment of the principal of or the interest on this debenture, or for any claim based hereon or otherwise in respect hereof or arising from the Indenture, against any incorporator, or against any past, present or future stockholder, director or officer of the Company, as such, or of any successor corporation, whether by virtue of any constitution, statute or rule of law, or by the enforcement of any assessment or penalty; all such liability being by the acceptance hereof, and as part of the consideration of the issue hereof, expressly waived and released by every holder or registered owner hereof.

Neither this debenture nor any coupon hereto attached shall be valid or become obligatory for any purpose unless

and until the certificate endorsed hereon shall have been executed by the Trustee under the Indenture.

In witness whereof, National Radiator Corporation has caused this debenture to be signed in its name by its President or a Vice-President, and its corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary, and coupons bearing the facsimile signature of its Treasurer to be hereunto attached, at The City of New York, New York. Dated August 1, 1927.

National Radiator Corporation, by —— ——, Vice-President.

[fol. 30] Attest:

—— ——, Assistant Secretary.

[Form of Interest Coupon]

No. —. $—.

On the first day of ——, 19—, unless the debenture hereinafter mentioned shall have been duly called for previous redemption and payment duly provided therefor, National Radiator Corporation will, upon the surrender hereof, pay to bearer at the principal office of Bankers Trust Company or at the office of J. & W. Seligman & Co. in the Borough of Manhattan, The City and State of New York, or, at the option of the bearer hereof, at the principal office of Continental and Commercial Trust and Savings Bank in Chicago, Illinois, — Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness existing August 1, 1927, without deduction for Federal income taxes (except such part thereof as may be in excess of 2% per annum of such interest) as provided in the debenture hereinafter mentioned, being six months' interest then due on its Six and One-half Per Cent. Sinking Fund Gold Debenture No. —.

—— ——, Treasurer.

[fol. 31] [Form of Trustee's Certificate]

This is one of the debentures described in the within mentioned Indenture.

Bankers Trust Company, Trustee, by —— ——, Assistant Secretary.

and

Whereas, all acts and things prescribed by law and by the certificate of incorporation and by-laws of the Company

necessary to make the debentures when executed by the Company and authenticated by the Trustee and duly issued the valid, binding and legal obligations of the Company in accordance with their terms, and constitute this Indenture a valid and binding agreement for the purposes and objects herein expressed, all in accordance with the terms, covenants and conditions herein contained, have been done and performed and have happened; and the execution and issue of the debentures and the execution and delivery of this Indenture have been in all respects duly authorized;

Now, therefore, this indenture witnesseth: That in order to provide for the payment of the debentures and the interest thereon, according to the true intent and meaning thereof, and in order to declare the covenants, terms and conditions upon or subject to which the debentures are to be issued, and for and in consideration of the premises and of the mutual covenants herein contained and of the purchase and acceptance of the debentures by the holders thereof, and of the sum of One Dollar lawful money of the [fol. 32] United States of America duly paid by the Trustee to the Company at or before the execution and delivery hereof, the receipt whereof is hereby acknowledged by the Company, the Company has executed and delivered this Indenture whereby the Company covenants and agrees with the Trustee for the equal and pro rata benefit (except as hereinafter in Section 2 of Article IV and Section 1 of Article V hereof expressly provided) of all present and future holders or registered owners of the debentures issued and to be issued under this Indenture, and of the coupons thereto attached, without preference, priority or distinction of any one debenture over any other debenture by reason of priority in the issue, sale or negotiation thereof, or otherwise, as follows:

Article I

Description, Execution, Exchange and Registration of Debentures

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Section 6. The debentures shall be negotiable and shall pass by delivery, unless registered as to principal in the manner hereinafter provided. The Company at an office or agency to be maintained by it in the Borough of Manhattan,

City and State of New York, will keep or cause to be kept books for the registration (as to principal only) and for the transfer of debentures, as provided in this Indenture.

The principal office of the Trustee in the Borough of Manhattan, City and State of New York, is hereby fixed as the office or agency of the Company, for the time being, in said Borough of Manhattan, for the registration and transfer of [fol. 33] debentures as herein provided.

The holder of any debenture, whether temporary or definitive, may have the ownership thereof registered as to principal, at such office or agency and such registration shall be noted on the debenture. After such registration, no transfer thereof shall be valid unless made at such office or agency by the registered owner in person, or by duly authorized attorney, and similarly noted on the debenture; but such debenture may be discharged from registration by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored; after which such debenture may again from time to time be registered or made transferable by delivery as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be payable to bearer and to be transferable by delivery merely, and payment thereof to bearer shall fully discharge the Company in respect of the interest therein mentioned, whether the debenture be registered or not.

For any such registration or transfer of a debenture, the Company at its option may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge incidental thereto.

With respect to all debentures registered as to principal, the persons in whose names such debentures shall be registered shall for all purposes of this Indenture be deemed and regarded as the absolute owners thereof, and payment of [fol. 34] or on account of the principal of any such debentures shall be made only to or upon the order of such registered owners thereof, but such registration may be changed as herein provided. All such payments shall be valid and effectual to satisfy and discharge the liability of the Company upon such debentures to the extent of the sum or sums so paid. The Company and the Trustee and any Paying Agent of the Company may deem and treat the bearer of any debenture issued hereunder which shall not at the time

be registered as to principal, and the bearer of any coupon for interest on any debenture, whether such debenture be registered as to principal or not, and whether such debenture or coupon be overdue or not, as the absolute owner of such debenture or coupon, as the case may be, for the purpose of receiving payment thereof and for all other purposes whatsoever, and neither the Company nor the Trustee nor any such Paying Agent shall be affected by any notice to the contrary.

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Article II

Authentication and Issue of Debentures

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Article III

Sinking Fund and Redemption of Debentures

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Article IV

Particular Covenants of the Company

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[fol. 35]

Article V

Remedies of Trustee and Holders of Debentures

Section 1. No coupon or claim for interest belonging to any of the debentures which in any way shall have been transferred or pledged separate and apart from the debenture to which it relates shall, unless accompanied by such debenture, be entitled in case of a default under this Indenture to any benefit of or from this Indenture except after the prior payment in full of the principal of the debentures and of all coupons or claims for interest not so transferred or pledged.

Section 2. In case one or more of the following events, herein termed events of default, shall happen, that is to say, in case

(a) default shall be made in the payment of any instalment of interest on any of the debentures when the same shall become payable, as therein or herein expressed; or

(b) Default shall be made in the payment of the principal of any of the debentures when the same shall become due and payable, either at maturity or by declaration or otherwise; or

(c) default shall be made in the payment of any instalment of the sinking fund herein provided for when the same shall become payable; or

(d) the Company shall create, issue, sell or assume any secured debt or obligation or lien contrary to the covenants of the Company herein; or

(e) default shall be made in the observance of any other of the covenants or agreements on the part of the Company in the debentures or in this Indenture expressed, and the [fol. 36] Company shall not remedy such default within sixty (60) days after written notice of such default, requiring the Company to comply with the covenant or agreement in respect of which it is so in default, shall have been served upon the Company by the Trustee which may at its direction, and at the request of the holders of not less than one-tenth in principal amount of the debentures then outstanding shall, serve such notice; or

(f) the Company shall be adjudged bankrupt or become insolvent, or a receiver shall be appointed of all or a substantial part of the property of the Company and not be dismissed within thirty (30) days after appointment; or

(g) the Company shall file a petition for voluntary bankruptcy or make a general assignment for the benefit of creditors, or shall admit in writing its inability to pay its debts as they become due; or

(h) final judgment for the payment of money shall be rendered against the Company and the Company shall not discharge the same or cause it to be discharged or a stay of execution to be procured thereon within sixty (60) days from entry thereof, or shall not within said period of sixty (60) days, or such longer period during which execution on such judgment shall have been stayed, appeal therefrom or from the order, decree or process upon which or pursuant to which said judgment was granted, passed or entered;

then the Trustee may in its discretion, and, upon request [fol. 37] in writing by the holders of at least one-fourth in

principal amount of the debentures then outstanding, shall, declare the principal of and interest on all the debentures, if not already due, to be forthwith due and payable, and upon such declaration the same shall become due and payable immediately. This provision, however, is subject to the conditions that if, at any time after the principal of the debentures shall have been so declared due and payable and before the recovery by the Trustee of final judgment or decree under this Indenture, all arrears of interest upon all of the debentures, with interest on overdue instalments of interest at the rate of six and one-half per centum (6½) per annum, and all arrears of sinking fund payments with interest on overdue payments at the rate of six and one-half per centum (6½) per annum, together with the reasonable charges and expenses of the Trustee, its agents and attorneys, shall be paid by the Company, and all other defaults under the debentures or any of them, or under this Indenture, shall be made good to the satisfaction of the Trustee, then and in such case the holders of a majority in principal amount of the debentures then outstanding, by written notice to the Company and to the Trustee, may rescind and annul such declaration and its consequences; but no such rescission or annulment shall extend to or affect any subsequent default or impair any right consequent thereon.

Section 3. In case

(a) default shall be made in the payment of any instalment of interest on any of the debentures when the same [fol. 38] shall become payable, as therein or herein expressed; or

(b) default shall be made in the payment of the principal of any of the debentures when the same shall become due and payable, either at maturity or by declaration or otherwise; or

(c) default shall be made in the payment of any instalment of the sinking fund herein provided for when the same shall become payable,

then, upon demand of the Trustee, the Company will pay to the Trustee, for the benefit of the holders and registered owners of the debentures and coupons then outstanding, the whole amount that then shall have become due and

payable on all such debentures and coupons then outstanding, for interest or principal, or both, or will pay to the Trustee all payments then due in respect of the sinking fund, as the case may be, with interest in each instance at the rate of six and one-half per centum (6½) per annum, upon the overdue principal, instalments of interest or sinking fund payments; and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Trustee, its agents, attorneys and counsel, and any expenses or liabilities incurred by the Trustee hereunder; and, in case the Company shall fail to pay the same forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid and to enforce such judgment in accordance with law.

[fol. 39] Any moneys thus collected by the Trustee shall be applied by the Trustee as follows:

(a) To the payment of all costs and expenses of such action, including reasonable compensation to the Trustee, its agents, attorneys and counsel and to the payment of all expenses, liabilities and advances made or incurred by the Trustee hereunder;

(b) In case the principal of the debentures shall not have become due, to the payment of the interest in default in the order of the maturity of the overdue instalments of such interest, with interest on the overdue instalments of interest at the rate of six and one-half per centum (6½) per annum; such payments to be made ratably to the persons entitled thereto, without discrimination or preference, subject, however, to the provisions of Section 2 of Article IV hereof and of Section 1 of this Article; or in case of default in the payment of any instalment of the sinking fund, to the payment of the sinking fund instalment so in default;

(c) In case the principal of the debentures shall have become due, to the payment of the whole amount then owing and unpaid upon the debentures for principal and interest, with interest at the rate of six and one-half per centum (6½) per annum on the overdue principal and overdue instalments of interest; and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the debentures, then to the payment of such

[fol. 40] principal and interest, without preference or priority of principal over interest or of interest over principal or of any instalment of interest over any other instalment of interest, ratably to the aggregate of such principal and the accrued and unpaid interest; subject, however, to the provisions of Section 2 of Article IV hereof and of Section 1 of this Article.

The Company, for itself, its successors and assigns, covenants and agrees with the Trustee, that if by reason of the happening and continuance of any event of default aforesaid the Trustee at any time commence or institute any suit or action or other legal proceeding to recover any judgment as in this Section 3 provided, it will, and its successors and assigns shall, waiving the issue and service of process, thereupon enter a voluntary appearance in such suit or action or proceeding, and consent to the entry of judgment therein for any and all amounts then remaining due and unpaid on all such debentures and coupons then outstanding, for interest or principal or both, or in respect of said sinking fund, as the case may be, and for all costs and attorneys' fees in such suit or action or proceeding, and for all other sums payable hereunder.

In the event of any bankruptcy or receivership of the Company or its properties, the Trustee is hereby irrevocably appointed the true and lawful agent and attorney of the holders and registered owners of the debentures and coupons, with full power and authority to file with any court or officer thereof proof of debt on behalf of such holders and registered owners in respect of their debentures and coupons and/or as creditors of the Company with [fol. 41] respect thereto, and to demand, collect, receive, sue or take such other proceedings for the collection and recovery of any sums paid or payable thereon, as the Trustee may be advised; but the Trustee shall be under no obligation with respect thereto.

Section 4. In case, upon the happening and continuance of any event of default specified in Section 2 of this Article, the Trustee shall proceed by a suit in equity or action at law, as above provided, the Trustee shall be entitled, pending any such suit or action, as a matter of right, to the appointment of a receiver of the Company and of all of its properties, and of the earnings, revenues, rents, issues, profits and incomes thereof.

Section 5. Upon written request of the holders or registered owners of at least one-fourth in principal amount of the debentures at the time outstanding, and upon being indemnified to its satisfaction, if the Trustee shall so require, as hereinafter provided, it shall be the duty of the Trustee to take all steps needful for the protection and enforcement of its rights and the rights of the holders or registered owners of the debentures whether by judicial proceedings or otherwise as the Trustee, being advised by counsel, shall deem most expedient in the interest of the holders or registered owners of the debentures.

Section 6. No holder of any debenture or coupon shall have any right to institute any suit, action or proceeding in equity or at law for the enforcement of any covenant or [fol. 42] remedy contained in or given by this Indenture, unless the holders or registered owners of at least ten per cent (10%) in principal amount of the debentures then outstanding shall have given to the Trustee written notice of some event of default and of the continuance thereof for the period, if any, in Section 2 of this Article provided; nor unless the holders or registered owners of at least twenty-five per cent (25%) in principal amount of the debentures then outstanding shall have requested the Trustee in writing to take action in respect of the matter complained of, and shall have afforded to it a reasonable opportunity to institute such action, suit or proceeding in its own name; nor unless also such holders or registered owners of debentures shall have offered to the Trustee security and indemnity satisfactory to the Trustee against the costs, expenses and liabilities to be incurred therein or thereby; nor unless the Trustee for thirty (30) days after receipt of such notification, request and offer of indemnity shall have refused or neglected to act on such notification, request and offer of indemnity; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of the Trustee, to be conditions precedent to the exercise of the powers and trusts of this Indenture and to the availability and the commencement and prosecution of any action or suit or proceeding hereunder, whether for the appointment of a receiver or for any other remedy; and it is expressly declared and intended that no one or more holders or registered owners of

debentures or coupons shall have any right to enforce any right hereunder, except in the manner herein provided, and [fol. 43] that all proceedings hereunder, at law or in equity, shall be instituted, had and maintained in the manner herein provided and for the equal and pro rata benefit of all holders or registered owners of such outstanding debentures and coupons.

Nothing in this Section or contained elsewhere in this Indenture or in the debentures or in the coupons attached thereto shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay the principal and interest of the debentures to the respective holders or registered owners of the debentures and to the respective holders of the coupons attached thereto, at the respective due dates in such debentures and coupons stated, nor affect or impair the right of action at law, which is also absolute and unconditional, of such holders to enforce such payment by virtue of the contract contained in the debenture and not by virtue or availing of any provision of this Indenture.

Section 7. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustee, or to the holders or registered owners of debentures, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and in addition to every other remedy given hereunder or now or hereafter available at law or in equity or by statute.

Section 8. No delay or omission of the Trustee or of any holder or registered owner of debentures to exercise any right or power accruing upon any event of default impair any such right or power or shall be construed to be a waiver [fol. 44] of any such default or acquiescence therein; and every power and remedy given by this Indenture to the Trustee or to the holders or registered owners of debentures may be exercised from time to time and as often as may be deemed expedient by the Trustee or by the holders or registered owners of debentures.

Section 9. All rights of action under this Indenture, or under any of the debentures or coupons, may be enforced by the Trustee without the possession of any of the debentures or coupons or the production thereof on any trial or other proceeding relative thereto, and any such suit or proceeding instituted by the Trustee shall be brought in its

name as Trustee, and any recovery of judgment shall be for the ratable benefit of the holders and registered owners of all of the debentures and coupons, except as provided in Section 2 of Article IV hereof, and Section 1 of this Article.

Article VI

Immunity of Stockholders, Officers and Directors

Article VII

Methods of Proof

Article VIII

The Trustee

[fol. 45]

Article IX

Defeasance

Article X

Concerning Consolidation, Merger and Sale

Section 1. Nothing in this Indenture contained shall prevent the consolidation or merger of the Company with or into any other corporation, or prevent any consolidation or merger with or into the Company of any other corporation, or prevent the sale by the Company of its property as an entirety; provided, however, that any such consolidation, merger or sale shall be on such terms as to preserve and not to impair any of the rights and powers of the Trustees and/or of the holders of the debentures, and that any successor corporation formed by or resulting from such consolidation or merger, or any corporation to which such sale shall be made, shall, as a part and condition of such consolidation or merger, and as a part of the purchase price for the sale of the property of the Company as an entirety,

expressly assume in writing the due and punctual payment of the principal and interest of all of the debentures, and the observance and performance of all of the covenants and conditions of this Indenture, and shall, simultaneously with the consummation of such consolidation, merger or sale, or simultaneously with the delivery to it of the conveyances for the property of the Company as an entirety, if such conveyances be delivered prior to the consummation of such consolidation, merger or sale, execute and deliver [fol. 46] to the Trustee a proper indenture, in form satisfactory to the Trustee, whereby such corporation formed by or resulting from such consolidation or merger or such corporation to which such sale shall be made shall so assume the due and punctual payment of the principal and interest of all of the debentures, and the observance of all of the covenants and conditions of this Indenture.

Section 2. In case the Company shall be so consolidated with or merged into any other corporation, or in case any corporation shall be consolidated with or merged into the Company as aforesaid, or in case of a sale of the property of the Company as an entirety, the corporation formed by or resulting from such consolidation or merger, or to which such sale shall have been made, upon executing and causing to be delivered to the Trustee a proper indenture, whereby such corporation shall assume the due and punctual payment of the principal of, and the interest on, all of the debentures then or at any time thereafter outstanding, and the performance of all the covenants and conditions of this Indenture, shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as party of the first part hereto, and such corporation may thereupon, subject to the provisions hereof, caused to be signed and sealed, and may issue, in its own name or in the name of the Company, any or all of the debentures which shall not theretofore have been signed and sealed by the Company and delivered to the Trustee, and upon the order of such corporation, in lieu of the Company, and subject to [fol. 47] all the terms, conditions and restrictions herein prescribed, the Trustee shall authenticate any and all debentures which shall have been previously signed and sealed by the officers of the Company and delivered to the Trustee for authentication and any debentures which such corporation shall thereafter cause to be signed and sealed and de-

liver to the Trustee for that purpose, and deliver the same to such corporation or upon its order signed by its President or a Vice-President and by its Secretary or an Assistant Secretary. All debentures so issued shall in all respects have the same legal security, rank and validity as the debentures theretofore or thereafter issued in accordance with the terms of this Indenture as though all of the debentures had been actually issued by the Company as of the date of the execution hereof.

Article XI

Definition and Miscellaneous Provisions

* * * * * * *

Signatures and Acknowledgments.

[fol. 48] SCHEDULE B

Reorganization of National Radiator Corporation.

Plan and Agreement Dated February 11, 1931

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Armand Erpf, 50 Broad Street, New York City, Secretary. Murray, Aldrich & Webb, 15 Broad Street, New York City, Counsel.

Depositary: Bankers Trust Company, 16 Wall Street, New York City

New York, N. Y., February 11, 1931.

To the holders of 6½% sinking-fund gold debentures, $7 cumulative convertible preferred stock, and common stock of National Radiator Corporation:

National Radiator Corporation (hereinafter called the "Corporation") has defaulted in the payment of the interest due February 1, 1931 on its outstanding Debentures, [fol. 49] the Board of Directors of the Corporation having reached the conclusion that, if the enterprise is to be maintained as a going concern, this interest payment must be omitted, as the continuance of business operations requires the conservation at this time of the cash resources of the Corporation.

The Corporation was formed in August, 1927, as the result of a merger of six companies. Before integration of

the constituent enterprises was perfected, unfavorable competitive conditions in the industry developed, and a drastic decline in residential building construction became apparent, which has since continued. The problem has been further aggravated by the industrial depression. According to estimates of a leading authority on building statistics, expenditures for residential building construction, which is the principal outlet for the products of the Corporation, began to decline in the middle of 1928, and in 1929 declined 30% as compared with 1928, and in 1930, 40% as compared with 1929.

The consolidated net earnings available for interest, after depreciation, since the merger, are reported as follows:

[fol. 50]	1927 (four months)	1928	1929	1930*
Net earnings available for Interest, after depreciation	$993,948	(d) 587,123	(d) 490,371	(d) 740,542
Debenture Interest	271,805	756,378	743,958	713,328
Net after Interest	722,143	(d)1,343,491	(d)1,234,329	(d)1,453,870
Additional charges to surplus	$222,752	658,689	51,451	

(d) Deficit.
* Tentative figures.

[fol. 51] The management of the Corporation has endeavored to meet these conditions, and in 1930 made substantial reductions in costs and overhead; it has been particularly concerned to maintain a liquid working capital position. The tentative balance sheet of the Corporation (not consolidated) as of December 31, 1930, approved as substantially correct by Messrs. Lybrand, Ross Bros. and Montgomery, who are at present engaged in auditing the accounts of the Corporation for the year 1930, is as follows:

Assets

Current Assets:	
Cash in Banks and on Hand	$1,701,899.94
Notes and Accounts Receivable, less Reserve	1,132,563.17
Inventories of Raw Materials, Finished and Semi-finished Stocks at Book Value	2,219,544.19

		$5,054,007.30
Investments at Book Value		67,939.60
Investments in and Advances to Affiliated Companies		458,431.50
Special Deposit Under Sec's Insurance Law, Funds for Redemption of Underlying Bonds, etc.		32,596.69
Real Estate, Machinery, Patterns and Other Equipment, Less Reserve for Depreciation		7,050,692.59
Good Will, Trademarks and Patents		6,634,501.90
[fol. 52]		
Deferred Assets and Prepaid Expenses		136,378.50
		$19,434,548.08

Liabilities

Current Liabilities:		
Accounts Payable		$46,787.60
Taxes and Other Accounts Accrued		151,768.54
Accrued Interest on Debentures		293,339.58
		$491,895.72
Reserves for Redemption of Underlying Bonds, Deferred Notes Payable, etc.		92,009.35
6½% Sinking Fund Gold Debentures Due 1947, Outstanding December 31, 1930	10,831,000.00	
Less Held in Treasury	115,000.00	10,716,000.00
Capital Stock (Stated Value) $7 Cumulative Convertible Preferred Stock (No par value) 58,646 shares outstanding and Common Stock (No par value) 272,708 shares outstanding	10,000,000.00	
Deficit	1,865,356.99	8,134,643.01
		$19,434,548.08

[fol. 53] While the working capital as reported is reasonably ample, it will be apparent that an increasing volume of business, such as the Corporation must anticipate in order to support even the reduced service on its capitalization as readjusted under the following Plan, will require the use of a correspondingly larger amount of cash to carry larger inventories and receivables. In addition, increased expenditures for the design of new products, and for equipment necessary in their manufacture, will be essential to keep the Corporation's competitive position as against other enterprises in the industry. Moreover, the outlook for the immediate future is obscure, with no definite promise of an early recovery in earning power.

Confronted with these problems, the management of the Corporation has sought a solution of the difficulties which would be most advantageous to the holders of the Corporation's securities. It is the firm conivction of the management that a liquidation of the Corporation, either by action of the stockholders or by a forced sale at the instance of the Debentureholders, would, under present conditions, result in a very small payment to Debentureholders and other creditors and might well prove disastrous, and would, in any event, leave nothing for the stockholders. Therefore, it is the view of the management that the only proper course, under the circumstances, is to effect with all possible expedition a reorganization of the Corporation upon a basis which will provide a revised capital structure with drastically reduced fixed charges, and which will permit the employment of the liquid assets in the current conduct of the business.

[fol. 54] To this end, the management (which includes the owners and representatives of owners of substantial amounts of the Debentures and the Preferred and Common Stocks) has requested the undersigned, Rudolph B. Flershem, Charles O. Cornell and John H. Waters, to act as a Reorganization Committee to formulate and submit to the security holders a Plan of Reorganization designed to accomplish the objects recommended by the management. This Committee is in accord with the conclusions of the management as stated above, and, believing that a reorganization of the Corporation may be effectively accomplished at this time, has formulated the following Plan of Reorganization. The Committee has consulted with other holders

of large amounts of the Debentures, who have approved the Plan.

The Plan is recommended by this Committee to your favorable consideration and you are urged to deposit your securities promptly, to insure that the Plan may be declared operative as soon as possible.

The Board of Directors of the Corporation and this Committee are convinced that, unless this Plan is carried out, the only alternative is liquidation which will deprive all security holders of any opportunity to participate in a revival of business following the present depression.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee.

[fol. 55]

Plan

I

Present Capitalization and Indebtedness

The Capitalization of National Radiator Corporation (hereinafter called the "Corporation") as of December 31, 1930, is as follows:

	Outstanding
6½% Sinking Fund Gold Debentures due August 1, 1947	$10,716,000
The interest due February 1, 1931, on the above Debentures amounts to $348,270.	
$7 Cumulative Convertible Preferred Stock without par value	58,646 shares
No dividends on this Preferred Stock have been paid since August 1, 1928.	
Common Stock without par value	272,708 shares

II

The New Company

A new corporation or corporations (hereinafter called the "New Company") will be organized with such corporate name and under the laws of such State of the United States as shall be approved by the Reorganization Committee, to acquire the assets and the business of the present Corporation, subject only to such changes as may result from the ordinary course of business, and subject also

to existing liens, charges and encumbrances. In so far as practicable, title to the assets and business so acquired will [fol. 56] be vested in the New Company, but in certain instances it may be deemed advisable to transfer certain of these assets to one or more subsidiary companies, whose entire capital stock (except directors' qualifying shares) will be owned by the New Company.

The capitalization of the New Company, upon the consummation of the Plan, will be approximately as follows:

	Authorized	To be presently outstanding
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares*	272,966 shares

*Up to 90,902 shares to be reserved against the exercise of Stock Subscription Warrants.

The New Company will assume and agree to pay in full all liabilities of the Corporation for taxes, wages, services and merchandise, which have not been paid at the time of the acquisition by the New Company of the assets and business of the Corporation.

III

Description of New Securities

The following securities (hereinafter collectively called "New Securities") will be authorized by the New Company:

[fol. 57] 1. 15-Year 5% Debentures (hereinafter called the "New Debentures") will be authorized for the aggregate principal amount of $5,500,000 and will be issued to the extent and upon the terms provided in the Plan. The New Debentures shall be dated March 1, 1931, shall mature March 1, 1946, and shall bear interest from their date, at the rate of 5% per annum, payable annually on March 1 in each year up to and including March 1, 1934, and payable thereafter semi-annually on March 1 and September

1 in each year, but required to be paid prior to the maturity of the principal thereof, only as hereinafter provided out of the New Company's net earnings, as such net earnings shall be more fully defined in the Indenture under which the New Debentures are issued. The interest will be cumulative, but accumulations of interest shall not bear interest. At the maturity of the principal of the New Debentures (whether by their terms or otherwise), all arrears of cumulative interest shall be payable, whether earned or not. The net earnings of the New Company for the calendar years 1931, 1932 and 1933 shall be determined annually by the Board of Directors of the New Company, and up to 40% of such net earnings shall be available for and shall be required to be applied to the payment of the interest on the New Debentures for the first three years, that is up to and including March 1, 1934. Beginning with the calendar year 1934, and in each year thereafter, the net earnings of the New Company shall be determined semi-annually by the Board of Directors, and all of the net earnings in each such year shall be available for and shall be required to be applied to the payment of the interest on [fol. 58] the New Debentures which is payable on September 1 in such year and on the next succeeding March 1, and to the payment of all arrears of cumulative interest. Said Indenture shall provide that no dividends on any class of stock of the New Company shall be paid or set apart for payment unless the interest on the New Debentures payable on the next succeeding interest date, at the full rate of 5% per annum, as well as all cumulative interest in arrears, if any, shall have been paid or set apart for payment.

The New Debentures will be issued under an Indenture to be made to a Trustee designated by the Reorganization Committee, which Indenture shall contain provisions approved by the Reorganization Committee, customary in such an instrument, including a covenant of the New Company that it will not mortgage or pledge any of its assets to secure any funded debt as defined in the Indenture, without simultaneously making provision for securing equally with such funded debt the New Debentures then issued and outstanding. The Indenture may also contain further provisions and restrictions approved by the Reorganization Committee, designed to protect the New Debentures. The New Debentures will be redeemable, as will be more fully

provided in said Indenture, as a whole or in part, on any interest payment date, at 107½% of their principal amount, together with all interest accumulated and accrued thereon to the date of such redemption; but they shall not be redeemed in part so long as any accumulated interest on any of the New Debentures remains unpaid.

[fol. 59] 2. $7 Preferred Stock (hereinafter called "New Preferred Stock") will be authorized for the amount of 55,000 shares without par value, and will be issued to the extent and upon the terms provided in the Plan. The New Preferred Stock will be preferred both as to assets and dividends and the holders thereof will be entitled to receive on voluntary liquidation $115 per share, and on involuntary liquidation $100 per share, plus in each case accumulated and unpaid dividends. The New Preferred Stock will be redeemable as a whole or in part on any dividend date at $115 per share, plus accumulated and unpaid dividends. The holders of the New Preferred Stock shall be entitled to receive preferential dividends at the rate of $7 per share per annum, payable quarterly on January 15, April 15, July 15 and October 15 in each year, when and as declared by the Board of Directors out of funds of the New Company legally available for such dividends. Such dividends shall be non-cumulative up to and including July 15, 1934, but shall be cumulative from and after July 15, 1934, that is to say, the first cumulative dividend will be the quarterly dividend payable on October 15, 1934. It shall be a term of the New Preferred Stock that the authorized number of shares of the New Preferred Stock shall not be increased, and that no additional shares of stock of any class ranking as to assets or dividends prior to or on a parity with the New Preferred Stock shall be authorized or issued by the New Company, without the consent of the holders of at least two-thirds in interest of the outstanding New Preferred Stock.

[fol. 60] The holders of the New Preferred Stock shall be entitled to one vote for each share.

3. Common Stock (hereinafter called "New Common Stock") will be authorized for the amount of 400,000 shares without par value, and will be issued to the extent and upon the terms provided in the Plan. 90,902 shares (or such lesser amount as may be required) of such New

Common Stock will be reserved for the exercise of the Common Stock Subscription Warrants below described.

The holders of New Common Stock shall be entitled to one vote for each share.

4. Common Stock Subscription Warrants (hereinafter called "Stock Warrants"), in form approved by the Reorganization Committee, will be authorized for issuance to the extent required for distribution to the Common Stockholders of the Corporation participating in the Plan. The Stock Warrants will be issued in registered form, and will grant the holder thereof the right to purchase shares of New Common Stock, at any time on or before July 1, 1941, at a purchase price of $20 per share. The Stock Warrants will be issued under an agreement which will contain provisions designed to safeguard the purchase right against dilution resulting from the issuance of additional Common Stock of the New Company, and to preserve such purchase right in the event that the New Company should merge or consolidate with one or more other corporations.

[fol. 61]

IV

Distribution of New Securities

Holders of the 6½% Sinking Fund Gold Debentures, the $7 Cumulative Convertible Preferred Stock and the Common Stock of the Corporation who become parties to the Plan, will be entitled, upon its consummation and the surrender of their Certificates of Deposit in form transferable by delivery, to receive New Securities upon the following basis:

1. Holders of 6½% Sinking Fund Gold Debentures of the Corporation will be entitled to receive, for each $1,000 principal amount of deposited Debentures, $500 principal amount of New Debentures and 5 shares of New Preferred Stock and 20 shares of New Common Stock.

2. Holders of $7 Cumulative Convertible Preferred Stock of the Corporation will be entitled to receive, for each share of deposited Preferred Stock, one share of New Common Stock.

3. Holders of Common Stock of the Corporation will be entitled to receive a Stock Warrant granting the right to

purchase as aforesaid one share of New Common Stock for every three shares of deposited Common Stock of the Corporation, but only upon the payment to the Depositary for the account of the Reorganization Committee of the sum of $1 in cash in respect of each share of New Common Stock covered by such Stock Warrant. No payment will be required of depositors of Common Stock of the Corpora-
[fol. 62] tion at the time of deposit or until the Plan has been declared operative and the Stock Warrants are ready for distribution. After the Stock Warrants are ready for distribution, the Reorganization Committee may fix a date on or before which such payment must be made by depositors of Common Stock, and, upon failure to make such payment within the time so fixed, such depositors will forfeit all rights under the Plan. Stock Warrants will be issued only in respect of even multiples of 3 shares of Common Stock of the Corporation, and fractions arising in respect of less than 3 shares of such Common Stock will be disregarded.

V

Method of Participation

Holders of Debentures and/or Preferred Stock and/or Common Stock of the Corporation, in order to participate in the Plan, must deposit with Bankers Trust Company, as Depositary, at its principal office at 16 Wall Street, in the City of New York, on or before March 15, 1931, or such later date as may be fixed by the Reorganization Committee, their Debentures and the certificates representing their shares of such Preferred Stock and Common Stock.

Stock certificates must be properly endorsed in blank for transfer or be accompanied by proper instruments of transfer in blank. Stock transfer stamps need not be attached, unless the Certificate of Deposit is to be issued in a name other than that of the registered owner of the deposited stock, in which case New York State and Federal stock transfer stamps, each at the rate of 2¢ per share (a
[fol. 63] total of 4¢ per share), must be furnished.

Debentures registered as to principal must be transferred to bearer before being deposited; and all Debentures must be accompanied by the appurtenant interest coupons maturing on and after February 1, 1931. All ref-

erences in the Plan and the annexed Agreement to Debentures shall, unless the context otherwise indicates, be deemed to include said coupons.

For the convenience of depositors in forwarding their securities, the Depositary will supply a form of transmittal letter.

Depositors will be entitled to receive transferable Certificates of Deposit issued by the Depositary under the Plan and the annexed Agreement, and by the acceptance of such Certificates of Deposit, the holders thereof shall be deemed to have assented to the Plan and said Agreement and to all the terms and provisions thereof.

VI

Provisions for Declaring the Plan Operative

The Reorganization Committee in its absolute discretion may determine whether and when a sufficient amount of securities of the various classes of the Corporation shall have been deposited under the Plan to render it advisable to declare the Plan operative. The Reorganization Committee may also declare the Plan abandoned at any time, notwithstanding it may previously have been declared operative, if in the judgment of the Reorganization Committee it is inadvisable or impracticable to carry out the Plan.

[fol. 64]

VII

Modification of Plan

The Reorganization Committee may modify the Plan or adopt a substitute plan, as in the annexed Agreement provided. In the event of any such modification or substitution, a copy of such modified or substituted plan shall thereupon be filed with the Depositary. In case of any modification of the Plan, which in the judgment of the Reorganization Committee shall adversely affect the holders of Certificates of Deposit for securities of any class or classes to any material degree, or in case of the adoption of any substitute plan, notice of such modification or substitution shall be given and the assent thereto of holders of Certificates of Deposit for the class or classes of securi-

ties so affected shall be obtained in the manner and with the effect provided in the annexed Agreement.

VIII

Reorganization Committee and Agreement

Messrs. Rudolph B. Flershem, Charles O. Cornell and John H. Waters have consented to act as a Reorganization Committee to carry out the Plan. The Reorganization Committee shall act by a majority of its members, as provided in the annexed Agreement. The Reorganization Committee shall be entitled to compensation. The expenses of the Reorganization will include the compensation and expenses of the Reorganization Committee and of the Trustee of the 6½% Sinking Fund Gold Debentures, including the fees of their counsel, and the compensation of the De- [fol. 65] positary. All compensation and expenses shall be determined by the Reorganization Committee, as provided in the annexed Agreement.

In furtherance of the Plan, the Reorganization Committee has executed the annexed Agreement, copies of which, with the Plan, are lodged with the Depositary. The Plan and said Agreement shall be deemed and constitute one instrument and depositors under the Plan shall be bound by all the terms of said Agreement, as parties thereto. In the event, however, of any conflict between the provisions of the Plan and said Agreement, the provisions of said Agreement shall control.

IX

Miscellaneous

The form and terms of all charters, certificates of incorporation, by-laws, debentures, indentures, certificates of stock, warrants and other securities of any corporation or corporations and of any other documents used in the Reorganization shall, in all respects not expressly defined by the Plan, be determined by the Reorganization Committee.

No fractional shares of stock of the New Company of any class will be issued and no New Debentures will be issued for less than $100 principal amount. In lieu thereof, fractional scrip may be issued in such form and on such terms and conditions as may be approved by the Reorganization Committee, and, as it may determine, such scrip

may be non-dividend bearing or non-interest bearing; or a cash adjustment may be made in respect of such fractions [fol. 66] on a basis fixed by the Reorganization Committee in its absolute discretion.

The Reorganization Committee shall have power, to be exercised in its absolute discretion, to consent to or arrange for the adjustment, by payment, settlement or purchase, of any and all claims and charges of every nature whatsoever which, in the opinion of the Reorganization Committee, should be adjusted in connection with the consummation of the Plan. The Reorganization Committee may arrange that the expense of any such adjustment shall be borne by the Corporation or the New Company; or, in its discretion, the Reorganization Committee may arrange for the participation in the Plan of any such claims or charges, and for that purpose may use any of the securities presently issuable in the Reorganization and not required for delivery to depositors. All general creditors of the Corporation, if any, other than those dealt with herein, whose claims shall be duly established, unless such claims are otherwise adjusted, shall be entitled, upon the consummation of the Reorganization, to receive new securities upon the same basis as the holders of the existing 6½% Debentures of the Corporation, upon assignment of their claims in form satisfactory to the Reorganization Committee within such period or periods as the Reorganization Committee may prescribe. All estimates of capitalization in the Plan omit consideration of any additional securities which may be issued or used for this purpose.

[fol. 67] No estimate, statement, explanation or suggestion contained in the Plan or the annexed Agreement or in any notice, circular or communication issued, or which may hereafter be issued, by the Reorganization Committee or by the Depositary or by the Corporation or by any of its officers or directors, is intended to be, or is to be accepted as, a representation or warranty or as a condition of deposit or assent under the Plan and said Agreement, and no error, defect or irregularity herein or therein, except by written consent of the Reorganization Committee, shall release any deposit under the Plan or said Agreement or affect or release any assent hereto or affect or release any payment made or action taken pursuant hereto.

Dated February 11, 1931.

[fol. 68] SCHEDULE "B" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

against

NATIONAL RADIATOR CORPORATION, Defendant

Answer

To the Honorable the Judges of said Court:

In answer to the Bill of Complaint in the above entitled case, National Radiator Corporation, the defendant above named, admits the truth of the allegations therein contained, joins in the prayers thereof, and consents to the appointment of a receiver or receivers as therein prayed for.

This answer is filed pursuant to a resolution of the Executive Committee of said defendant corporation adopted at a meeting of said Committee duly called and held on the 8th [fol. 69] day of October, 1931, a certified copy of the said resolution being annexed hereto.

National Radiator Corporation, by Chas. L. Crouse, Vice-President. Attest: Carl E. Resley, Secretary. H. S. Endsley, Johnstown, Pennsylvania, Solicitor for the Defendant.

Whereas, a bill of complaint has been filed in the District Court of the United States for the Western District of Pennsylvania by Rudolph B. Flershem, et al., as a Reorganization Committee, complainants, against National Radiator Corporation, defendant, praying inter alia for the appointment of receivers of all the property and assets of the corporation for the protection of the creditors of the corporation, and a subpœna in such action has been duly served upon this corporation; and

Whereas, the corporation has been advised that ancillary bills of a similar character will be filed in other jurisdictions throughout the United States where this corporation owns properties; and

Whereas, it is the judgment of the directors of the corporation that it is for the best interests of the creditors and stockholders of the corporation that receivers be appointed as aforesaid;

[fol. 70] Now, Therefore, Resolved, That H. S. Endsley, Esquire, be authorized to enter an appearing for this corporation in said proceeding and that the answer of the corporation to the bill of complaint be executed on behalf of the corporation by any executive officer under the corporate seal attested by the secretary, and filed, admitting the truth of the allegations contained in the bill and joining in the prayers thereof, and consenting to the appointment of a receiver or receivers for the corporation;

Further Resolved, That H. S. Endsley, as counsel, is hereby authorized to select counsel in the various jurisdictions where any such ancillary bills may be filed, and to authorize and instruct counsel so selected to appear and to file on behalf of the corporation in any and all such ancillary causes answers similar to the answer hereby authorized to be filed in the principal cause in the Western District of Pennsylvania.

Further Resolved, That the officers of the corporation and H. S. Endsley, its counsel, are hereby authorized to do, or cause to be done, all such acts and things, and to execute, sign, and file all such papers, as may be necessary to carry out the intent of the foregoing resolutions.

Certificate

I, the undersigned, —— ——, Secretary of National Radiator Corporation, do hereby certify that the foregoing is a [fol. 71] true and correct copy of recitals and resolutions adopted by the Board of Directors of said corporation at a meeting of said Board duly called and held in the City of Johnstown, Pennsylvania, on the eighth day of October, 1931.

—— ——.

SCHEDULE "C" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

against

NATIONAL RADIATOR CORPORATION, Defendant

Decree Appointing Receiver

And now, to-wit, this 9th day of October, 1931, this matter came on to be heard on bill and answer, and upon consideration thereof, on motion of counsel for complainants, the defendant appearing and consenting thereto, it is or- [fol. 72] dered, adjudged and decreed as follows:

First. The defendant, National Radiator Corporation, being presently unable to meet and discharge its obligations which have already matured, without seriously jeopardizing the ability of the defendant to continue in business, it is to the interest and advantage of the creditors and stockholders of the defendant that a receiver be appointed for all its assets.

Second. That Robert S. Waters, of Johnstown, Pa., and William G. Heiner, of Pittsburgh, Pa., be and hereby are appointed Receivers of all and singular, the lands, tenements and hereditaments of the defendant and all its real and personal property, business, rights, estates, and effects whatsoever, wheresoever the same may be situate, including its merchandise, stocks and bonds, choses in action, bills and accounts receivable, cash in hand and in bank, and all its easements, franchises, rights, privileges, and interests, and all of the tolls, earnings, rents, issues, profits, revenues and income thereof and every part thereof.

Third. The said Receivers are hereby authorized to take possession of all and singular the property, business, assets

and effects above described or referred to, wheresoever situate, and until further order of this Court, said Receivers shall manage and control said property and shall preserve the property, assets and effects in proper condition and repair so that they may safely and advantageously be used and shall fully protect the same and employ such persons [fol. 73] and make such payments and disbursements as may be necessary or proper for so doing, and shall report their actions to this Court from time to time.

Fourth. The said Receivers shall have full power to demand, sue for and collect, receive and take into their possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the defendant and to institute suits at law or in equity for the recovery of any assets, property damages or demands existing in favor of said corporation, and in their discretion to compound and settle with any debtors of said corporation, with persons having possession of its property or in any way responsible at law or in equity to said corporation at the time of this appointment or afterwards, upon such terms and in such manner as they may deem just and beneficial to ~~said~~ corporation. Said receivers are hereby further authorized to intervene in and become a party to such suits, actions and proceedings, at law or in equity, including ancillary proceedings in state or federal courts, as may, in their judgment, be necessary or proper for the protection, maintenance or preservation of the receivership estate, or any part thereof, or in aid of the decrees or ordered entered or made by this Court, and to apply to any such court for any such order or orders as may be deemed by them necessary or proper.

Fifth: It is further ordered, adjudged and decreed that the defendant and each of its officers, agents, directors and employees be, and they are hereby required to transfer, [fol. 74] convey and turn over to the Receivers, or their duly constituted agent, all of the real and personal property, business, assets and effects above described or referred to, and all of the property and assets of the defendant, and all books, papers and other personal property belonging to the defendant in their or its hands or subject to their or its control.

Sixth. It is further ordered that the defendant, its agents, directors, officers, servants and employees and all other persons, be and they are hereby enjoined and restrained from in any way levying upon, attaching, selling, disposing, transferring or in any manner interfering with any of the property of the defendant or from taking possession of or in any way interfering with any parts thereof or from in any manner disturbing or interfering with the possession or management of any part of said property over which the said Receivers are hereby appointed, and doing any act or thing to prevent the discharge by said Receivers of their duties under this decree.

Seventh. Until the further order of this Court, said Receivers shall continue to carry on the business of the National Radiator Corporation, the defendant, to continue the manufacture and sale of its products, to dispose of its stock on hand, make such purchases as may be necessary to enable it to carry on its business, complete such contracts and orders of the defendant as in the judgment of the Receivers may be advantageous and for the best interests of the defendant and its creditors, and make, accept and carry [fol. 75] out such new contracts and orders as in their judgment may be advisable; and said Receivers are further vested with full discretion in the matter of handling the present business of the defendant and any new business which may be taken and accepted by them and to handle the same in accordance with the customs of the business and the trade in which the defendant is engaged. Said Receivers shall have full power and authority to sell and discount negotiable instruments of customers or customers' invoices and to endorse the same.

Ninth. Said Receivers shall be, and hereby they are, allowed four months from the date of this decree (unless the time be extended by further order of this Court) within which to elect to adopt or continue in force, or to refuse to adopt or continue in force, any lease or other contract of whatsoever character not fully performed which may be included in the property or assets of the defendant or which shall have been entered into by the defendant. Said election may be made from time to time and shall be made by an instrument in writing subscribed by said Receivers and filed in the office of the Clerk of this Court, and no

conduct or uses of the rights by said Receivers or payments made or received by them, as rent or otherwise, or any other acts or omissions of said Receivers within said period of four months unaccompanied by the filing of such written instrument shall be deemed to conclude said Receivers in respect of such election or be deemed to constitute an election to adopt or to continue in force any such contract, lease or agreement.

[fol. 76] Tenth. Said Receivers shall open books of account and shall keep, or cause to be kept, therein due and proper accounts of all earnings, expenses, receipts and disbursements of and with respect to the properties and assets in their possession or under their control, the conduct of said business and the conduct or carrying on of any other business or undertaking which said Receivers hereby are or hereafter shall be authorized to conduct or carry on; shall preserve proper vouchers for all payments made by them on account thereof; and shall deposit all funds coming into their hands in such banks as shall be selected by them and approved by this Court.

Eleventh. The right is reserved to the parties hereto or to any and all other parties in interest, to apply to this Court for any other instructions to said Receivers, and the Court reserves the full right and jurisdiction to make from time to time such further orders, amplifying, extending, limiting or otherwise modifying this decree, as to it may at any time seem proper, and in all respects and at all times to regulate and control the conduct of said Receivers.

Twelfth. In case of the death, resignation or inability of the Receivers hereby appointed, or either of them, and the appointment of a successor or successors, the provisions of this decree shall be applicable to such successor or successors from and after his or their said appointment without further order of this Court and with like effect as if such successor or successors were herein specifically named as said Receiver or Receivers.

[fol. 77] Thirteenth. Said Receivers shall, before entering upon the discharge of their duties, file a bond, with

a surety to be approved by this Court, in the sum of Fifty Thousand ($50,000) Dollars, conditioned for the faithful discharge of their duties as such Receivers.

Per Curiam:

G.

Certified from the record this 9 day of Oct. 1931.
J. Wood Clark, Clerk. (Seal of U. S. District Court, W. D. Pennsylvania.)

IN UNITED STATES DISTRICT COURT

In Equity. No. 2597

MOTION TO DISMISS—Filed Jan. 19, 1932

Now come the above-named defendants, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and hereby move this Honorable Court to dismiss the above-entitled action and to dismiss the complainant's bill of complaint herein, on the ground that it appears on the face of said bill of complaint that it does not state facts sufficient to constitute a cause of action and is wholly without equity, [fol. 78] and for such other relief as may be proper, together with the costs of this motion.

Dated January 19, 1932.

Reed, Smith, Shaw & McClay, Solicitors for the Above-named Defendants, Reorganization Committee, Union Trust Building, Pittsburgh, Pennsylvania.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed Jan. 19, 1932

Now comes the above named defendant, National Radiator Corporation, and hereby moves this Honorable Court to dismiss the above entitled action and to dismiss the Com-

plainant's Bill of Complaint herein, on the ground that it appears on the face of said Bill of Complaint that it does not state facts sufficient to constitute a cause of action and is wholly without equity, and for such other relief as may be proper, together with the costs of this Motion.

Dated January 19, 1932.

H. S. Endsley, Solicitor for National Radiator Corporation, Defendant, Suite 1102, First National Bank Building, Johnstown, Pennsylvania.

[fol. 79] In United States District Court

Motion for Stay of Proceedings—Filed March 29, 1932

Now comes the above named complainant, Lily Clapier, and hereby moves this Honorable Court to stay all proceedings in the cause now pending in this Honorable Court, wherein Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation are the complainants and National Radiator Corporation is defendant; until the final determination of this cause, brought by the complainant, to vacate and set aside the decree in the action aforesaid and to dismiss the complaint therein on the ground that the failure to do so may be prejudicial and inimical to the interests of the complainant.

Dated March 29th, 1932.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Attorneys for Lily Clapier, Complainant.

In United States District Court

Opinion—Filed May 31, 1932

Gibson, District Judge:

This action has been brought by the plaintiff to secure the vacation of all orders made in pursuance of a bill in [fol. 80] equity filed in this Court against the National Ra-

diator Corporation by the other defendants herein. The plaintiffs in that suit were a committee representing more than 95% of the holders of a very large debenture bond issue of the defendant. The bill set forth a default in payment under the debenture issue agreement and threats of many suits on the part of bondholders. It prayed the appointment of a receiver and the ultimate sale of the property under the order of the Court. The bill was specifically stated to be for the purpose of bringing about a reorganization of the defendant company, and set out a proposed plan of reorganization, differing in no essential respect from the ordinary reorganization bill. The defendant filed its answer admitting the allegations of the bill. Shortly after the suit was instituted the Bankers Trust Company of New York, Trustee under the bond issue, intervened as a party plaintiff, alleging a judgment against the defendant for the amount of the issue, with accrued interest. And later, the First National Bank of Cincinnati, a bondholder whose interest was identical with that of plaintiff in the instant action, was allowed to intervene as a party defendant. Receivers were appointed pursuant to the prayer of the bill.

The present plaintiff did not seek to intervene in the proceeding mentioned, but has filed the present bill. She is the holder of bonds of the Radiator Corporation of the amount of $11,000, the total bonds outstanding being in amount of more than $10,000,000. The plaintiff, in effect, asserts a lack of jurisdiction of the court to entertain the bill attacked by plaintiff, and charges a conspiracy by the parties to the original suit to defraud the present plaintiff [fol. 81] and others in like situation.

The parties to the original suit have moved to dismiss the bill in the instant case, alleging that it fails to set forth facts sufficient to constitute a cause of action.

An examination of the bill of complaint has convinced us that the motions of the defendants should be sustained. The bill is couched in the most general terms and, which charging improper collusion between the defendants, sets out nothing in a specific way from which any fraud upon complainant is to be inferred.

Incidently, we may say that we have heard like charges in the original case (No. 2558 In Equity), but the evidence did not tend to sustain them. We shall this day file a decree

in that case. The evidence indicates that the primary suit was along conventional lines. See Continental &c. Trust & Savings Bank v. Allis-Chalmers Co., 200 Fed. 600; In re Babcock, 26 Fed. (2) 153; Re Metropolitan Railway Receivership, 208 U. S. 90; Horn v. Pen Marquette R. Co., 151 Fed. 626; Guaranty Trust Co. v. C., M. & St. P. Ry. Co., 15 Fed. (2d) 434.

We are entirely satisfied that the original case was within the jurisdiction of the court, and that the appointment of receivers therein was justified.

The instant bill will be dismissed. In arriving at this result we have not considered the question of our jurisdiction to entertain the present bill, wherein citizens and residents of the same state as that of the plaintiff are joined with others as defendants.

[fol. 82] In United States District Court

Decree

And now, to wit, May 31, 1932, the motion of the defendants to dismiss the bill of complaint in the above entitled matter having come on to be heard, upon consideration thereof, it appearing to the Court that said bill does not state facts constituting a cause of action, and is without equity, it is ordered, adjudged and decreed that said bill of complaint be, and the same hereby is, dismissed,

Per Curiam:

G.

And now to wit, July 5, 1932, upon request of counsel for plaintiff, an exception is noted to the order dismissing the bill of complaint, and bill sealed.

R. M. Gibson, District Judge. (Seal.)

In United States District Court

Petition for Appeal—Filed July 12, 1932

To the Honorable the Judges of said Court:

The complainant, Lily Clapier, conceiving herself aggrieved by the decree made and entered on the 31st day of May, 1932, in the above entitled case, dismissing the com-

plainant's Bill of Complaint, hereby appeals therefrom to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the Assignments of Error filed herewith, and she prays that this appeal may be allowed; that a citation be issued directed to the above named defendants, commanding them to appear before the said United States Circuit Court of Appeals for the Third [fol. 83] Circuit to do and receive what may appertain to justice to be done in the premises; that a transcript of the record, proceeding and papers upon which said decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit; and that an order be made fixing the amount of the cost bond which said complainant shall give and furnish upon said appeal.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Complainant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Now, to wit, July 12th, 1932, the foregoing petition of Lily Clapier, the complainant, having been presented in open court, and it appearing to the court that the petitioner has filed her Assignments of Error, it is ordered and decreed that an appeal be, and the same hereby is, allowed to the United States Circuit Court of Appeals for the Third Circuit from the decree entered in the above entitled case on May 31st, 1932; that a citation be issued, directed to the above named defendants, commanding them to appear before the said United States Circuit Court of Appeals for the Third Circuit; that a transcript of the record, proceedings and papers upon which said decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit; and that an appeal bond for costs be given in the sum of $500.00.

Nelson McVicar, District Judge.

[fol. 84] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed July 12, 1932

Now comes Lily Clapier, the complainant herein, by her solicitors, and, having prayed an appeal from the decree

entered in this cause on May 31st, 1932, dismissing the complainant's bill of complaint, respectfully shows that said decree is erroneous, and should be reversed and set aside, for the following reasons:

1. The District Court erred in entering a decree dismissing the bill of complaint, the said decree and the exception thereto being as follows:

"Decree

And now, to wit, May 31, 1932, the motion of the defendants to dismiss the bill of complaint in the above entitled matter having come on to be heard, upon consideration thereof, it appearing to the Court that said bill does not state facts constituting a cause of action, and is without equity, it is ordered, adjudged and decreed that said bill of complaint be, and the same hereby is, dismissed.

Per Curiam: G.

And now, to wit, July 5th, 1932, upon request of counsel for plaintiff, an exception is noted to the order dismissing the bill of complaint, and bill sealed.

Robert M. Gibson, District Judge. (Seal.)"

[fol. 85] 2. The District Court erred in holding that the bill of complaint does not state facts constituting a cause of action.

3. The District Court erred in holding that the bill of complaint is without equity.

4. The District Court erred in refusing to grant to the complainant the relief prayed for in the bill of complaint.

Wherefore, and in order that the foregoing Assignments of Error may be and appear of record in this cause, the complainant herein presents the same to this court, and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided; and the complainant further prays that said final decree may be reversed and the District Court be directed to enter a decree in this cause in conformity with the prayer of the bill of complaint, or in such form as the United States Circuit Court of Appeals for the Third Circuit shall deem just.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Complainant.

IN UNITED STATES DISTRICT COURT

APPELLANT'S PRÆCIPE FOR RECORD ON APPEAL—Filed July 25, 1932

To J. Wood Clark, Clerk:

Please incorporate the following portions of the record into the transcript on the appeal in the above entitled case:

[fol. 86] 1. Copy of the docket entries.

2. The Bill of Complaint, together with the following exhibits referred to therein:

(a) Schedule "A," being the Bill of Complaint in the suit of Rudolph B. Flershem et al., as the Reorganization Committee, etc., Complainants, vs. National Radiator Corporation, Defendant, at No. 2558 In Equity, of this court, together with the following portions only of Schedule "A" (Indenture, dated August 1st, 1927) and of Schedule "B" (Plan and Agreement of Reorganization, dated February 11th, 1931) attached thereto:

Portions of Schedule "A,"—Indenture dated August 1, 1927,—to be printed:

Cover.

First two paragraphs on page 1.

Title only of Article I on page 8, viz: "Article I, Description, Execution, Exchange and Registration of Indenture."

Title only of Article II on page 14.

Title only of Article III on page 31.

Title only of Article IV on page 42.

The whole of Article V, beginning with the title on page 52 and ending with Section 9 of said Article, on page 60, inclusive.

Title only of Article VI on page 60.

Title only of Article VII on page 61.

Title only of Article VIII on page 62.

Title only of Article IX on page 68.

The whole of Article X, beginning with the title, on page 69, and including Sections 1 and 2 of said Article.

[fol. 87] Title only of Article XI on page 71.

The words: "Signatures and acknowledgments."

Portions of Schedule "B,"—Plan and Agreement dated February 11th, 1931,—to be printed:

Cover.

Pages 1 to 11 inclusive.

(b) Schedule "B," being the Answer filed by the defendant in said suit at No. 2558, In Equity.

(c) Schedule "C," being the Decree Appointing Receiver, entered in said suit at No. 2558, In Equity.

3. Motion of the defendants, Rudolph B. Flershem et al., as the Reorganization Committee, etc., to Dismiss the Bill of Complaint.

4. Motion of the defendant, National Radiator Corporation, to dismiss the Bill of Complaint.

5. Complainant's Motion for Stay.

6. Opinion and Decree of this court entered on May 31st, 1932, dismissing the Bill of Complaint, together with the complainant's exception to said Decree.

7. Petition and Order for this Appeal.

8. Assignments of Error.

9. This Præcipe and the Acceptance of Service thereof.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Complainant.

[fol. 88] Acceptance of Service

Service of the above Præcipe for Record on Appeal accepted this 20th day of July, 1932.

Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for Appellees Flershem et al., as the Reorganization Committee. H. S. Endsley, Solicitor for Defendant National Radiator Corporation.

July 22, 1932.

In United States District Court

Appellees' Præcipe for Record on Appeal—Filed July 28, 1932

To J. Wood Clark, Clerk.

Sir: In paragraph 2 (a) of appellant's præcipe for record on appeal you are directed to incorporate in such record the Bill of Complaint in the suit of Rudolph B. Flershem, et al., as the Reorganization Committee, etc., Complainants,

vs. National Radiator Corporation, Defendant, at No. 2558 In Equity of this Court, together with certain portions only of Indenture dated August 1, 1927, annexed to said Bill of Complaint and referred to as Schedule "A."

In addition to the portions of said Indenture directed as aforesaid, by the appellant to be incorporated in the record [fol. 89] on appeal herein, you are requested on behalf of the appellees to incorporate in said record the following portions of said Indenture:

All of Section 6, being pages 11, 12 and 13.

All of pages 1 to 7, inclusive, and the first one-third of page 8 down to the beginning of Article I.

Reed, Smith, Shaw & McClay, Solicitors for Defendants-Appellees.

July 28, 1932.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 90] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1932

Lily Clapier, Appellant,

vs.

R. B. Flershem et al., Reorganization Committee of National Radiator Corp., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

Order Assigning Judges—Filed Dec. 14, 1932

And now, towit, this 14th day of December, A. D. 1932, it is ordered that Hon. Oliver B. Dickinson, District Judge for the Eastern District of Pennsylvania, and Hon. William H. Kirkpatrick, District Judge for the Eastern District of Pennsylvania, be, and they are hereby, assigned to sit in above case in order to make a full court.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 91] Minute entry of argument and submission, December 14, 1932, omitted in printing.

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 4959, 5020, October Term, 1932

DUDOLPH B. FLERSHEM et al., Committee for the Reorganization of National Radiator Corporation, and Bankers Trust Company, Trustee,

v.

NATIONAL RADIATOR CORPORATION, Defendant, and FIRST NATIONAL BANK OF CINCINNATI and International Heater Company, Intervening Defendants and Appellants

No. 4956, October Term, 1932

LILY CLAPIER, Appellant,

v.

RUDOLPH B. FLERSHEM et al., Appellees

No. 5037, October Term, 1932

JOSEPHINE RAMSEY et al., Appellants,

v.

RUDOLPH B. FLERSHEM et al., Appellees

[fol. 93] No. 5040, October Term, 1932

EDWARD J. RAMSEY, Appellant,

v.

RUDOLPH B. FLERSHEM et al., Appellees

Appeals from the District Court of the United States for the Western District of Pennsylvania

Before Woolley, Circuit Judge, and Dickinson and Kirkpatrick, District Judges

OPINION—Filed March 24, 1933

WOOLLEY, Circuit Judge:

The National Radiator Corporation was engaged in the manufacture and sale of radiators, boilers and other in-

strumentalities of radiation. It was organized in 1927 by the consolidation or merger of six independent companies in the radiator industry. Preliminary to the consolidation an appraisal of their assets was made in the sum of $26,192,000 (speaking for convenience always in round numbers). Upon the basis of this appraisal and a showing of earnings of the constituent companies for the previous four years in sums between $2,456,000 and $3,488,000 a year, the new corporation, with $2,972,000 in cash and current liabilities of $1,478,000, issued $12,000,000 Gold Sinking Fund Debentures, bearing 6½ per cent. interest, of which $10,[fol. 94] 705,000 became outstanding. It also issued 60,000 shares of $7.00 Cumulative Convertible Preferred Stock and 270,000 shares (no par value) of common stock at an estimated value of $11,500,000, making total liabilities to securityholders of all grades of about $23,000,000. Neither then nor later did it place mortgage liens upon its properties.

With this capital structure, completed in August 1927, the new corporation embarked in business and earned $993,000 in the last four months of that year. In 1928, however, the construction of residential, commercial and industrial buildings throughout the country, on which the business of the corporation was dependent, began to fall off. Immediately unfavorable competitive conditions developed. Construction work continued to decline, causing the corporation to suffer in each of the three years succeeding its organization an average deficit of $600,000 before interest on the debentures or a deficit of $1,310,000 after interest but before sinking fund charges. In this situation, which was becoming progressively worse, the corporation defaulted in interest on the debentures due February 1, 1931, though unquestionably having in hand more than enough money to pay it. A Reorganization Committee, being appointed, set to work and evolved a plan to which we shall advert presently. To this plan about 96 per cent. of the securityholders assented. About 3 per cent. stood silent and 1 per cent. objected. This took time. Another interest payment came due August 1, 1931, on which the corporation defaulted. It defaulted also on its sinking fund obligation, though having enough money in hand to pay the former and partially, if not wholly, to meet the latter. During these successive defaults the corpora-

tion was, naturally enough, harassed by suits and threats of suits. To prevent waste in the creditors' race of diligence and to protect securityholders, the members of the [fol. 95] Reorganization Committee, on October 1, 1931, filed a bill in the District Court praying for the appointment of receivers. Their prayer was granted.

The receivers, nine or ten months after their appointment, asked the court for an order authorizing them to sell all the assets of the corporation at a judicial sale for an upset price to be named by the court and under terms of the Reorganization Plan. The plain purpose of the application was to dispose of the corporation's assets in a manner which would conserve and hold them as a going concern for the protection of the senior securityholders.

The Court made such an order. In August, 1932, the receivers sold all the assets on the bid of the Reorganization Committee and the court confirmed the sale. The position of the objecting securityholders (now appellants) is that, assuming but never conceding its jurisdiction to order and confirm the sale, the court erred in fixing the upset price of $2,500,000 and in confirming the sale for $2,550,000.

On the motion for an order of sale the learned trial judge set about to fix an upset price by determining the fair market value of the assets, an almost insuperable task when considered with respect to their character, the feeble market for some of them and, in these extraordinary times, an entire absence of a market for others. He had before him book values of upwards of $18,000,000 which, manifestly, were values out of all relation to the actualities. He was dealing with a proposed sale in the midst of a great business depression and therefore was concerned with selling values; doubtless realizing that, ordinarily, a thing is worth only what it will fetch. He called upon all parties for evidence on the subject. The complainants, at a hearing lasting four days, produced a mass of facts, figures and opinions; the objecting securityholders produced nothing. On the uncontradicted evidence, which was all he had to go [fol. 96] on, the learned judge set an upset price for all assets of the corporation at $2,500,000, or $200,000 more than the highest figure the witnesses had given of what might be expected in liquidation.

We have at much labor studied and absorbed this record. A recital of the mass of facts and figures would add nothing

to the decision of the case. It will be sufficient to say that, notwithstanding what on first view is a startling disparity between book values and market values, we cannot find on the evidence that the learned judge erred in naming the price in the order of sale. If the upset price of $2,500,000 reflected the fair market value of the assets, we cannot find on the assignment charging error in confirming the sale that the purchase price of $2,550,000 was inadequate. At this figure, the purchase price was two per cent above the upset price and ten per cent above the highest price the evidence indicated as likely to be realized in liquidation.

The assignments charging error in the order of sale and the order of confirmation are dismissed.

The law of the case arises out of a demand by the appellant-securityholders that they be paid and, to that end, the corporation be put in liquidation, and out of their challenge of the jurisdiction of the court to appoint receivers and order a sale of assets under the proposed plan of reorganization which they say was devised by certain securityholders and officials of the corporation and the trustee for the debentures in fraud of other securityholders.

We shall briefly dispose of the last question—collusion and fraud—by giving our judgment, which is in complete accord with the finding of the learned trial judge, that while the evidence shows consultation and co-operation between these several parties in formulating the plan it does not disclose collusion or fraud.

[fol. 97] We have now reached the central question in the case, that of jurisdiction of the court to entertain the bill for receivers. It is pertinent to note the bill did not say the corporation was insolvent. That, in effect, was a tacit admission or declaration of its solvency. The corporation, by its answer, admitted the truth of all allegations of the bill.

Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. It was perhaps not then known, as was subsequently proved, that the corporation was insolvent within the definition of the Bankruptcy Act (Section 1, cl. 15), where "the aggregate of (its) property * * * (was) not, at a fair valuation, sufficient in amount to pay (its) debts". Whatever may have been the corporation's con-

dition as to solvency at the time of bringing the action, clearly the bill was filed on the assumption of its solvency, yet on the need of a conservation receivership for the protection of securityholders, who ranked as creditors. Although after the appointment of receivers and before sale of the assets, the Bankers Trust Company, trustee for the debentures, brought two suits against the corporation, one for interest in arrears, the other for the principal of the debentures, and obtained judgments in the aggregate amount of $11,674,000, thereby indicating, as a practical matter, that the corporation was then insolvent within any of the definitions, we shall continue to regard the receivership according to the tenor of the bill, as one for conservation of assets. In this connection it should be noted as bearing on the court's jurisdiction that the complainants in the bill were not judgment creditors. The respondent corporation, however, tacitly waived that fact and expressly consented to the decree. The Pusey & Jones Company v. Hanssen, 261 U. S. 491, 497; Shapiro v. Wilgus, 287 U. S. [fol. 98] p. 348. Thereafter the Bankers Trust Company, plaintiff in the two judgments and then a judgment creditor of the corporation, was allowed to intervene as party-plaintiff in this case and thenceforward participated in its prosecution.

The appellants' attack on the jurisdiction of the court to entertain the bill, appoint receivers and order a sale of assets as an entirety is disclosed by the three questions they have presented:

(1) "May a federal court of equity, in the absence of other equitable grounds, take jurisdiction of a foreign corporation which is solvent and able, in regular course, to pay its obligations in full, for the primary purpose of reorganizing it?"

(2) "May a federal court of equity, in the absence of other equitable grounds, and solely for the purpose of reorganizing a corporation which is not insolvent nor in imminence of insolvency appoint receivers to take possession of such corporation's property until it can be sold?"

The plain answer to these questions is "no."

The phrase "in the absence of other equitable grounds" compels this answer because it excludes the essence of the

court's jurisdiction in such matters. It is the presence of equitable grounds calling for relief in equity which gives the court jurisdiction. A court of equity is not a forum of convenience to be used by a corporation merely to straighten out its business difficulties or to rebuild its financial structure. Nor is it a place of refuge to which debtors may go for protection against their creditors and against the remedies of suit, judgment, execution and sale which the law affords them. Debtor corporations are not wards of chancery. There is nothing in the mere fact of a corporation's indebtedness, nor in its inability to pay, nor in its wish to make some composition with its creditors that confers equitable jurisdiction upon a court. It is only when [fol. 99] there is something in a situation which sets up an equitable right and admits of equitable relief that parties may go into a court of equity and assert one and obtain the other. Common instances are where a corporation is insolvent or where its insolvency is imminent. Even in the latter case the right of a federal court of equity (cautiously exercised) to appoint receivers at the instance of simple contract creditors if the debtor corporation consents, is not, as one of the appellants admits, debatable. Michigan v. Michigan Trust Company, 286 U. S. 334; Shapiro v. Wilgus, 287 U. S. p. 348.

The appellants' third question, however, contains no nullifying exceptions and goes directly to the point. It is:

(3) "Does the bill of complaint in the primary cause set forth facts sufficient to constitute a cause of action for the appointment of receivers or for other equitable relief?"

The bill must, as we have stated, have equity, and equity will not lie in the mere fact, if such were the case, that the corporation could not pay interest. Here the corporation could presently pay, but payment foretold imminent consequences disastrous to the corporation and, what is more to the point, disastrous to its securityholders. Plainly those consequences were insolvency with its attendant evils to all concerned. The fact that the corporation had in hand sufficient money to meet certain current indebtedness did not alter the underlying conditions. Continental & Commercial T. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 613; In re Babcock, 26 Fed. (2) 153. The facts of the situation, showing, as we find, imminence of insolvency and collapse, call-

ing for protection of creditors, constituted a ground of equity for which relief could validly be asked by simple contract creditors within the law of The Pusey & Jones Com-
[fol. 100] pany v. Hanssen, 261 U. S. 491 and within the warning of Shapiro v. Wilgus, 287 U. S. p. 348. The case therefore falls within the rule distinguished and succinctly stated by Judge Learned Hand in Luhrig Collieries Co. v. Interstate Coal & Dock Co., 281 Fed. 265, 268, 269. There he showed that a bill of the character of this one, filed by simple contact creditors, is an evolution out of the judgment creditors' bill to supplement the writ of execution, of which a court of equity may, with caution, assume jurisdiction with the consent of the debtor corporation. Re Metropolitan Railway Company, 208 U. S. 90. He then said:

"But if it appears that the assets of every kind are not enough to pay all creditors, if left to a general welter of attachments, executions, and separate creditors' bills, a different situation is presented. The corporation may well be solvent if it assets be nursed along, and insolvent if they be thrown to the creditors for piecemeal sale. Recognizing in such event that creditors' bills will in the end be necessary, though unsuccessful, equity will anticipate them by presently stepping in, in the interest of securing the greatest possible payment ratably for all creditors, since the protection of creditors is an interest of equity as well as law."

We find that on the bill, and on the evidence to which we cannot close our eyes, the court had jurisdiction.

The remaining question is whether the holders of old debentures, 96 per cent assenting, should be required to take new securities under the plan. The answer to this question depends on whether the proposed distribution of the new securities, as to character and quantity, is fair?

On the first question the appellants insist that holders of debentures, being "creditors, must be paid in full before
[fol. 101] any interest in the new company can be given to the stockholders of the old corporation," citing Northern Pacific Railway v. Boyd, 228 U. S. 482, or, failing payment, there should be imposed against the property of the corporation liens for the full amount of their claims. As the appellants have no greater right to liens than to payment,

we shall limit our discussion to their claim for payment. If by the expression "paid in full" they mean that the debenture holders must be paid in cash, the Boyd case is not authority for that position. If they mean that, as non-assenting securityholders, they cannot be required to take securities in the new corporation which fairly represent in value and preference securities they hold in the old corporation, Phipps v. Chicago, R. I. & P. Ry. Co., 284 Fed. 945, 949 and Boyd case itself (508) are authorities against them. St. Louis & San Francisco Ry. Co. v. McElvain, 253 Fed. 123; P. R. Walsh Tie & Lumber Co. v. Missouri Pacific Ry. Co., 280 Fed. 38, 44; Temmer v. Denver Tramway Co., 18 Fed. (2d) 226.

In the case of Northern Pacific v. Boyd, where common stock in an old corporation was exchanged for common stock in a new one to the exclusion of creditors, the court held that a transaction in which stockholders are preferred to creditors is invalid. In the instant case holders of common stock in the old corporation will, under the plan, be given nothing in the new corporation. They will, however, be accorded the right to buy, for $1.00, a stock warrant for each three shares of old common stock they may own. One stock warrant gives them the right to buy, before July 1, 1941, on share of new common stock at $20. The stock warrant, when bought and issued, is not a security of the corporation; it is rather a chip giving a right to gamble. Thus holders of old common stock, who, seemingly, are not complaining, stand aside, leaving the holders of old debentures [fol. 102] and old preferred stock as the only ones to be considered in determining whether the proposed distribution is fair.

The proposed plan of distribution was evidently made on the theory that the assets of the corporation, represented by new securities, belong to creditors rather than to the corporation, Coriell v. Morris White, Inc., 54 Fed. (2d) 255, and belong particularly to senior creditors. It is manifest that the new corporation, as in the case of the old one, could not continue business in these times and survive periodical fixed interest charges. Earnings necessary to that end were not and, for a time, may not be forthcoming, hence the provision in the plan for new debentures with interest payable at 5 per cent. when earned. New debentures—really income bonds without lien yet protected against mortgages

by a provision for equality—will be given only to holders of old debentures—$500 new for each $1000 old. Stockholders, either preferred or common, will get none of them. So far, the substituted debenture is of the same grade as the old one, differing in interest rate and in time of interest payments.

In addition the holder of $1000 old debentures will receive 5 shares (no par value) of 7 per cent. new preferred stock. The interest rate of the new preferred stock is higher than the interest rate of the old debenture but is payable only when earned, cumulative after an early date. As the new preferred stock is at present to be distributed only to holders of old debentures, there is little difference between them as to grade and preference. Then, finally, the holder of $1000 old debentures will receive 20 shares of new common stock for what they may be worth.

Old preferred stock will be exchanged for new common stock, share for share. Holders of these securities apparently are not complaining. Certainly the holders of debentures cannot complain of a stock distribution that does not affect them.

[fol. 103] And, finally, the new corporation will assume and pay the liabilities of the old corporation for taxes, wages, services and merchandise amounting to about $42,000.

We can understand why 96 per cent of the securityholders regard this distribution as fair, particularly as none of the appellants or anyone else has suggested any plan that is better or different. It is in our judgment fair and equitable.

The appellants, however, while declaring the plan of distribution unfair, are opposed to any plan because they say neither this one nor any other can hold out a promise of success. Therefore they insist upon immediate and complete liquidation of the corporation's assets. Notwithstanding the lack of purchasers and the probability of receiving nothing, they take the stand that they prefer, and in law have a right, to know and accept their fate now.

We are constrained to hold, however, that as against the rights of all other creditors they cannot in equity prevail.

In reaching this judgment we have brought into force no new principles of equity. We have simply applied to new facts old principles found in the zone in which the Boyd,

Phipps, Luhrig Collieries, Pusey & Jones and Shapiro cases are landmarks.

There remains a matter raised on appeal by the International Heater Company, one of the intervening defendants, which is not free from difficulties. It appears that two of the companies entering into the merger held two-thirds of the capital stock of Lincoln Radiator Company, the other one-third being held by the International Heater Company, which stayed out of the merger. This one-third interest was acquired by the respondent corporation from the International for $100,000, of which $60,000 remains unpaid, evidenced by an equal face amount of promissory notes due [fol. 104] serially at the rate of $20,000 per annum. These promissory notes and the corporation's outstanding unsecured debentures constitute its entire funded debt. The plan of reorganization covers an offer to the International of securities of the same character and number that are offered to holders of the old debentures. The International says, however, that it never held the corporation's debentures or other formal securities; that, as a creditor under the corporation's notes of hand, it is entitled to payment in cash and therefore has attacked what was done by the court below.

Our trouble has been in classifying the International Heater Company as a creditor, feeling that if properly classified its rights would be those of the class of which it is a member. Manifestly, it is not a secured or a preferred creditor. It is not a merchandise creditor or a creditor in respect to debts currently incurred in the usual course of the corporation's business. It neither sold the corporation merchandise nor rendered it service. It simply sold it shares of stock in another corporation. The notes which were received therefor are indicative that the payee, the International, is a general creditor, nothing more, nothing less. Being so, it stands on the same plane with holders of the debentures who, likewise, are general creditors. Therefore we can see no difference between the two in law and none in the consequences of the receivership. Yet, just here, the International takes the position that there is a difference between itself and holders of debentures, as general creditors, in that it did not buy debenture securities of the corporation with their attendant hazards but accepted its notes promising payment for property sold

and assigned, and that not having bought into the corporation's difficulties it stands outside of matters involving their solution and should be discharged with full payment [fol. 105] of its claim in money. This distinction does not appeal to us as controlling, for the International voluntarily became a general creditor of the corporation, is, as such, involved in its difficulties and can get out only by the means which the court has afforded general creditors who, without regard to the origin of their claims, have that status at the time the securities representing the corporation's assets are to be distributed.

All orders and decrees of the District Court here on appeal are affirmed.

A true copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 106] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 4956

LILY CLAPIER, Appellant,

vs.

R. B. FLERSHEM et al., Reorganization Committee of National Radiator Corp., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed March 24, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders and decrees of the said District Court, here on appeal, in this cause be, and the same are hereby, affirmed, with costs.

Philadelphia, March 24, 1933.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 107] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 108] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,662. U. S. Circuit Court of Appeals, Third Circuit. Term No. 65. Lily Clapier, petitioner, vs. Rudolph B. Flershem, Charles O. Cornell, John H. Waters, et al., etc. Petition for a writ of certiorari and exhibit thereto. Filed May 12, 1933. No. 65, O. T., 1933.

FILE COPY

FILED

MAY 12 1933

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 965

LILY CLAPIER,

Petitioner
(Appellant Below),

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and NATIONAL RADIATOR CORPORATION,

Respondents
(Appellees Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

DAVID M. PALLEY,
of New York, N. Y.

CHARLES H. SACHS,
of Pittsburgh, Pa.,
of Counsel.

GALLO & ACKERMAN, Inc., 142 Liberty Street, Telephones—Rector 2-5856-7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

LILY CLAPIER,

Petitioner
(Appellant Below),

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and NATIONAL RADIATOR CORPORATION,

Respondents
(Appellees Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable CHARLES E. HUGHES, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

LILY CLAPIER, the above named petitioner, respectfully prays that a writ of certiorari issue to review the

decree of the United States Circuit Court of Appeals for the Third Circuit, entered on March 24th, 1933, affirming the decree (R., 82) of the United States District Court for the Western District of Pennsylvania, dated the 31st day of May, 1932, and made by Judge Gibson, dismissing the petitioner's ancillary bill in the nature of a bill of review on the grounds that it does not state a good and sufficient cause of action and that it is without equity.

Statement.

On or about October 9th, 1931, the respondents, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, filed a bill of complaint against the respondent, National Radiator Corporation, in which they prayed for the appointment of receivers of said corporation, the sale of its assets and the distribution of the proceeds (R., 9). The National Radiator Corporation appeared in that cause, admitted the allegations of the bill and joined in the prayer for relief (R., 68). Upon that bill and answer, a decree was entered, receivers were appointed (R., 71) and creditors were enjoined from enforcing payment of their claims.

On December 11th, 1931 (R., 2), the petitioner who was the owner of $11,000.00 principal amount of the company's debentures and was not a party to that cause, filed an ancillary bill in the nature of a bill of review, in which she prayed that the decree in the primary cause be vacated and the bill dismissed on the ground that it is apparent upon the face of that bill that the court did not have jurisdiction of the subject matter of the cause and that no cause of action for equitable relief or cognizable by a court of equity was set forth.

The primary cause was not brought on the ground that the defendant corporation was insolvent or in imminence of insolvency. Although the bill declares that intervention by the court was necessary to prevent "a multiplicity of suits, a race of diligence, wasteful strife and controversy" (R., 17), it is apparent from a perusal of that bill and the exhibits annexed thereto that on October 9th, 1931, the National Radiator Corporation was solvent and amply able to pay in full, in cash, every debt presently due and maturing. It is also apparent that jurisdiction was invoked solely for the purpose of effectuating a reorganization of the company in order to scale its funded debt and to coerce non-assenting debentureholders into subjection to the plan or else to wipe them out.

The National Radiator Corporation, a Delaware corporation, was engaged in the business of manufacturing and selling heating appliances, boilers and radiators (R., 10). It was formed in August, 1927, by a merger of six companies (R., 49), and on December 31st, 1930, it had outstanding 58,646 shares of $7.00 cumulative preferred stock, of no par value, and 272,708 shares of common stock, also of no par value, which at that time were carried on the books at $8,134,643.01 (R., 52).

On or about August 30th, 1927, the company authorized an issue of $16,000,000.00 principal amount, 6½%, Sinking Fund Gold Debentures, and pursuant to that authority, there was issued $12,000,000.00 of said debentures which, on October 9th, 1931, had been reduced to $10,705,000.00 (R., 12). The debentures mature August 1st, 1947, bear interest at the rate of 6½% per annum, payable semi-annually on the first days of February and August in each year. The terms and provisions governing their issue and the appurtenant interest coupons, as well as the rights and remedies of the holders, are set forth in an Indenture (Schedule A, annexed to the original bill, R., 22-47) made and executed between the

National Radiator Corporation and the Bankers Trust Company, a New York corporation, as Trustee (R., 11).

On February 1st, 1931, the National Radiator Corporation refused to pay the installment of interest which then became due on its outstanding debentures (R., 48-49).

On February 1st, 1931, the National Radiator Corporation was solvent and liquid and able to discharge in full, in cash, every obligation then due and payable. In the Plan and Agreement (Schedule B, annexed to the original bill, R., 48-67) is a financial statement of the company's condition as of December 31st, 1930, just one month before (R., 51-52). It discloses that on that day the company had a net worth of $8,134,643.01; its assets were $19,434,548.08; its liabilities, including the outstanding debentures, were $11,299,905.07.

Especially noteworthy and impressive is the statement of its current assets and current liabilities. On December 31st the quick current assets of the company were $5,054,007.30 and of that $1,701,899.94 was in cash. Its current liabilities at that time were $491,895.72 (only $46,787.60 was presently due, R., 52) and included therein was $293,339.58 accrued interest upon its outstanding debentures. The ratio of cash to current liabilities was more than 3½ to 1. The ratio of current assets to current liabilities was more than 10 to 1.

On February 1st, 1931, another month's interest amounting to $53,580.00 had accrued upon its debentures and the liabilities presently due and maturing were thereby increased to $545,475.72. It is obvious, however, that on February 1st, 1931, the company could have paid all its current debts including the interest on the debentures out of cash alone and there would still have remained in cash $1,200,000.00, and none of the other current assets would have been affected.

The company was manifestly solvent and liquid. Its refusal to pay the interest upon the outstanding debentures was unconscionable.

The explanation, given by the parties to that cause, for the refusal to pay the interest on February 1st, 1931, is that the cash was needed as working capital for an anticipated increase of business, for the carrying of larger inventories and for the purchase of new machinery and equipment, in order to maintain the corporation's competitive position in the industry (R., 53). A further explanation was that the outlook for the immediate future was obscure (R., 53).

Not only was the payment of interest omitted, but for the reasons given the company had decided to reorganize in order to scale its funded debt and thus drastically reduce its fixed charges (R., 53). On February 11th, 1931, ten days after the default, a reorganization committee appointed by the company promulgated a plan of reorganization (R., 54) and appointed the Bankers Trust Company, the Trustee of the debentures, depositary under the plan (R., 62).

The plan is all in the interest of the company, discriminates between debentureholders and other creditors of equal rank, contains no provision for any new capital and makes no provision for non-assenting debentureholders.

The plan contemplates the organization of a new corporation to which is to be transferred all of the assets of the old corporation, including cash (R., 55). The capital structure of the new corporation is to be as follows (R., 56):

	Authorized	*To Be Presently Outstanding*
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares	272,966 shares

The new debentures bear interest at the rate of 5% per annum which, however, is payable only out of income (R., 57).

Merchandise and service creditors are to be paid in full by the new company unless they shall have been previously paid by the old (R., 56).

Debentureholders, however, are to receive for each $1,000.00 principal amount of old debentures $500.00 principal amount of new debentures, 5 shares of new preferred stock and 20 shares of new common stock (R., 61).

The holders of present preferred stock are to receive, share for share, common stock of the new corporation. Holders of the present common stock are to receive stock warrants of the new company in the ratio of 1 to 3, namely, one stock warrant of the new company for each three shares of the old, **upon payment to the Reorganization Committee** of $1.00 for each warrant issued (R., 61). Holders of the warrants are entitled to purchase, **on or before July 1st, 1941,** shares of common stock in the new company upon payment of $20.00 per share (R., 60).

There is no provision for any assessment upon the preferred stockholders and the holders of the stock warrants have until the 1st day of July, 1941, to decide whether to exercise their option or not.

On August 1st, 1931, the company also refused to pay the installment of interest which then became due upon the outstanding debentures (R., 14). A large number of debentureholders refused to assent to the plan, demanded payment of their interest and threatened suit when such payment was refused (R., 16). Thereupon, the bill in the primary cause was filed by the Reorganization Committee; the National Radiator Corporation appeared and consented to the decree, and the decree appointing receivers and enjoining creditors was entered (R., 71).

There is no allegation anywhere in that bill or in the answer that the corporation was then unable to pay its debts, current and maturing in regular course; nor is there any allegation that the company was insolvent or in imminence of insolvency.

There is nothing in the record to show that on October 9th, 1931, the financial condition of the company was substantially different from what it was on February 1st, 1931. The only statement of the company's financial condition submitted to the court, at the time of the making of the decree, was the statement of December 31st, 1930 (R., 51-52), which is contained in the Plan and Agreement annexed to the bill of complaint, and in the absence of proof to the contrary, the only inference that can be drawn is that it substantially represents the condition of the company at the time that it was submitted.

Of course, there must be added to the debts of the company the installment of interest on its outstanding debentures, amounting to $374,675.00, which became due on August 1st, 1931, and which was not paid. The current debts of the company were thereby increased to $920,150.72. Even then there was more than enough cash to pay and discharge in full the current debts, including the interest upon the debentures, without affecting any of the other current assets.

It was apparent to the court at the time of the making of the decree that the National Radiator Corporation was not insolvent or in imminence of insolvency. The principal of the debentures was not due until August 1st, 1947, sixteen years later; and the corporation had ample funds with which to pay and discharge in full, in cash, all its debts presently due and payable, including the arrears of interest upon the debentures.

Nor is there any pretense on the part of the respondents that the company was insolvent or in imminence of insolvency. The objection was only to the payment

of the accrued interest upon the debentures (R., 16), but not to the payment of the other debts of the corporation which were to be assumed by the new company if not previously paid by the old (R., 56). The respondents implicitly concede the solvency of the corporation and expressly admit that the suit was instituted to prevent creditors who refused to assent to the plan of reorganization, from collecting the interest upon their debentures (R., 16).

The Indenture expressly provides that in the event of a sale by the company of its property as an entirety, the obligations of the debentures shall be assumed by the new company (R., 45-47). It is therefore obvious that the suit was instituted to compass the transfer of the property and business of the National Radiator Corporation free from those obligations. As stated by Judge Gibson in his opinion (R., 80):

> "* * * The bill was specifically stated to be for the purpose of bringing about a reorganization of the defendant company * * *."

We have thus set forth briefly the state of the record in the primary cause at the time of the filing of the petitioner's ancillary bill.

The appeal in this cause was heard by the Circuit Court of Appeals for the Third Circuit at the same time as the other appeals from decrees in the primary cause and the Circuit Court of Appeals rendered a single opinion, per Woolley, C. J. In its opinion the Circuit Court of Appeals said:

> "* * * It is pertinent to note the bill did not say the corporation was insolvent. That, in effect, was a tacit admission or declaration of its solvency. The corporation, by its answer, admitted the truth of all allegations of the bill.

"Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. * * *"

The Questions Presented.

1. Did the Circuit Court of Appeals rightly decide by affirming the decree of the District Court that the petitioner's ancillary bill does not state facts constituting a cause of action and is without equity?

2. Did the Circuit Court of Appeals rightly decide that the District Court had jurisdiction over the subject matter in the primary cause?

3. May a Federal court of equity take jurisdiction and appoint receivers of a corporation which is solvent and able to pay and discharge in full, in cash, all its debts then due and maturing, merely because of the possibility that in the future the corporation may be unable to meet the debts which would then become due?

4. May a Federal court of equity take jurisdiction and appoint receivers of a corporation which is solvent and able to pay and discharge in full, in cash, all its debts then due and maturing, merely because the Board of Directors decides that it is desirable to reorganize it in order to scale its funded debt?

5. May a Federal court of equity take jurisdiction of a corporation which is solvent and able to pay in full, in cash, its debts presently due and maturing for the sole purpose of reorganizing it?

Reasons Relied on for the Allowance of the Writ.

A.

The exercise of jurisdiction in this cause is wholly without precedent and marks a departure from the accepted principles of law governing equity receiverships. It permits a going corporation which is solvent, liquid and amply able to meet and discharge its debts due and maturing, to evade its just obligations.

B.

The exercise of jurisdiction in this cause carries to the extreme the abuses so strongly condemned by this Court in Harkin vs. Brundage, 276 U. S., 36; Michigan vs. Michigan Trust Co., 286 U. S., 334; and Shapiro vs. Wilgus, 287 U. S., 348.

C.

The exercise of jurisdiction in this cause violates the fundamental rules of property and rights of creditors and constitutes a taking of property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

Importance and Novelty of the Questions.

The questions involved in this cause are novel and in importance transcend the private interests of the petitioner. This Court has thrice warned against the perversion of the function of receivership and its use for the purpose of hindering and delaying creditors in the enforcement of their rights.

The legitimate functions of the remedy and the uses and extent to which it may be employed have never been definitely delimited by this Court. There is no doubt

that the doctrine in this case, unless reversed, will be widely applied and will be used as a precedent for the right of corporations to reorganize in order to scale their funded debts when, in the discretion of the board of directors, such a course is advisable.

The present case and the petition of Amy Arzt and Josephine Ramsey for a writ of certiorari which is being presented to this Court in the primary cause simultaneously herewith, place before this Court for the first time the whole subject of equity receiverships and their legitimate function.

We respectfully submit that it is of public importance that this Court should authoritatively and definitely define the uses, functions and limits of that remedy.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit, should be granted.

LILY CLAPIER.

DAVID M. PALLEY,
of New York, N. Y.

CHARLES H. SACHS,
of Pittsburgh, Pa.,
of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1932.

No.

LILY CLAPIER,

Petitioner
(*Appellant Below*),

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and NATIONAL RADIATOR CORPORATION,

Respondents
(*Appellees Below*).

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported; the opinion of Judge Gibson appears at page 79 of the record but has not been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered in the office of the Clerk of the Circuit Court for the Third Circuit on March 24th, 1933.

Jurisdiction to issue the writ is found in the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13th, 1925.

Statement of Facts.

The principal facts are stated in the foregoing petition.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the decree of the District Court, dated May 31st, 1932, and in not vacating the decree and dismissing the bill of complaint in the primary cause as to the petitioner and all other creditors who did not assent to the plan of reorganization.

2. The Circuit Court of Appeals erred in holding that the jurisdiction over the subject matter in the primary cause existed and was properly exercised.

3. The Circuit Court of Appeals erred in holding that the exercise of jurisdiction in the primary cause did not constitute a taking of property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

Argument.

I.

A Federal court of equity may not take jurisdiction, for the purpose of reorganizing it, of a corporation which is solvent and able to pay all its debts presently due and maturing, in full, in cash. The exercise of jurisdiction in such a case violates the fundamental principles of property and rights of creditors and consti-

tutes a taking of property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

We have, in the brief submitted in support of the petition for a writ of certiorari presented to this court by Amy Arzt and Josephine Ramsey in the primary cause, set forth our theory of the fundamental principles governing creditors' suits in equity.

There exists an erroneous, but widely held belief, that diversity of citizenship in concatenation with the cabalistic formula, "multiplicity of suits, race of diligence, wasteful strife and controversy" vests in a Federal court of equity the power to reorganize corporations and effect under judicial sanction a fraudulent transfer of assets with a commutation of debts. That receivership in creditors' suits is distinctly an ancillary remedy for the enforcement of creditors' rights is being constantly overlooked and the results flowing from the exercise of that remedy have been mistaken for the remedy itself.

Through this misapprehension of the function and purpose of creditors' suits and the appointment of receivers therein, a remedy designed for the prevention of wrongs to creditors has been perverted into a means for the frustration of rights of creditors; and jurisdiction assumed to assure equitable distribution amongst creditors has, by transformation, been employed to bring about inequitable discrimination against creditors.

Indisputably, the primary cause was instituted for the purpose of effecting a reorganization of the National Radiator Corporation in accordance with the plan devised by the Reorganization Committee appointed by it.

It is apparent from even a superficial reading of the bill of complaint and the exhibits annexed thereto that the corporation was not insolvent nor threatened with immediate insolvency; that jurisdiction was invoked and receivers appointed to hold at bay debentureholders who refused to assent to the reorganization as planned and

demanded payment of the interest upon the debentures they held. It is also apparent that the corporation could have paid to the Reorganization Committee and to the other debentureholders, as well as to every other creditor, every claim then due out of the cash then in its possession. It is evident that not payment but prevention of payment, with the ultimate acquisition of the property, business and assets of the corporation free from the obligation to pay, was the real purpose of the suit.

No reason for the sale of the assets and the distribution of the proceeds was shown and none existed; the appeal was made to the court to employ its power of sale and distribution as a subterfuge in order to accomplish the transfer, to the National Radiator Corporation, disguised in the form of a new corporation, of all its business, property and assets as a going concern, absolved from the obligation to pay its debts to its non-assenting creditors.

The assumption and retention of jurisdiction in the primary cause was a departure from accepted principles of law and constituted a taking of property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

Conclusion.

It is important that the questions and principles governing equity receiverships be authoritatively settled by this court.

Respectfully submitted,

DAVID M. PALLEY,
of New York, N. Y.

CHARLES H. SACHS,
of Pittsburgh, Pa.,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 65.

LILY CLAPIER,

Petitioner,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITIONER'S BRIEF.

DAVID M. PALLEY,
of New York, N. Y.,

CHARLES H. SACHS,
LOUIS CAPLAN,
of Pittsburgh, Pa.,
of Counsel.

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IN THE

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No. 65.

LILY CLAPIER,

Petitioner,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITIONER'S BRIEF.

This case comes to this Court on a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Third Circuit, entered on March 24th, 1933, affirming a decree of the United States District Court for the Western District of Pennsylvania, dated May 31st, 1932 (R., 53), made by Judge Gibson dismissing the petitioner's bill on the ground that it does not state facts constituting a cause of action and is without equity.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 64 F. (2d) 847. The opinion of Judge Gibson is not reported but appears in the record at page 51.

Jurisdiction.

The decree of the United States Circuit Court of Appeals was entered in the office of the Clerk of the United States Circuit Court of Appeals for the Third Circuit on March 24th, 1933 (R., 69).

Jurisdiction to review this case is found in the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. 347.

Statement of the Case.

This is a companion case of Arzt and Ramsey, Petitioners, v. Rudolph B. Flershem, et al., No. 64, upon the calendar of this Court.

At the very threshold of the receivership, the petitioner by a bill in the nature of a bill of review, challenged the jurisdiction of the District Court and impugned its right to seize the assets and appoint receivers of the National Radiator Corporation in the cause brought by the respondents, Rudolph B. Flershem, et al., against that company (hereinafter referred to as the "primary cause").

The primary cause was not brought on the ground that the defendant corporation was insolvent or in imminence of insolvency. Although the bill declares that intervention by the court was necessary to prevent "a multiplicity of suits, a race of diligence, wasteful strife and controversy" (R., 11), it is apparent from a perusal of that bill and the exhibits annexed thereto *that on October 9th, 1931, the National Radiator Corporation was solvent and amply able to pay in full, in cash, every debt as it matured in regular course.* It is also apparent that jurisdiction was invoked solely for the purpose of effectuating a reorganization of the company in order to scale its funded

debt and to coerce non-assenting debentureholders into subjection to the plan or else to wipe them out.

On October 9th, 1931, the District Court, upon the bill of complaint of the respondents, Flershem, et al. (R., 6), and the answer (R., 44) of the respondent, National Radiator Corporation, appointed Robert S. Waters and William G. Heiner receivers of said company (R., 46) and enjoined creditors from enforcing their claims against said company (R., 48).

On December 11th, 1931 (R., 2), the petitioner who is the owner of $11,000.00 principal amount of the company's debentures (R., 2) and was not a party to that cause, filed a bill in the nature of a bill of review, in which she prayed that the decree in the primary cause be vacated and the bill dismissed *on the ground that it is apparent upon the face of that bill* that the court did not have jurisdiction of the subject matter of the cause and that no cause of action for equitable relief or cognizable by a court of equity was set forth; that the suit was instituted to hinder, delay and defraud non-assenting debentureholders; and that the exercise of jurisdiction was in violation of the due process clause of the Fifth Amendment of the Constitution of the United States (R., 3-5).

The bill of complaint in that cause and the exhibits thereto annexed disclose the following facts.

The National Radiator Corporation, a Delaware corporation (R., 6), was engaged in the business of manufacturing and selling heating appliances, boilers and radiators (R., 8). It was formed in August, 1927, by a merger of six companies (R., 31), and on December 31st, 1930, it had outstanding 58,646 shares of $7.00 cumulative preferred stock, of no par value, and 272,708 shares of common stock, also of no par value, which at that time were carried on the books at $8,134,643.01 (R., 33).

On or about August 30th, 1927, the company authorized an issue of $16,000,000.00 principal amount, 6½%,

Sinking Fund Gold Debentures (R., 7), and pursuant to that authority, there was issued $12,000,000.00 of said debentures which, on October 9th, 1931, had been reduced to $10,705,000.00 (R., 8). The debentures mature August 1st, 1947, bear interest at the rate of 6½% per annum, payable semi-annually on the first days of February and August in each year (R., 7). The terms and provisions governing their issue and the appurtenant interest coupons, as well as the rights and remedies of the holders, are set forth in an Indenture (R., 7) (Schedule A, annexed to the bill, R., 14-31) made and executed between the National Radiator Corporation and the Bankers Trust Company, a New York corporation, as Trustee (R., 7).

On February 1st, 1931, the National Radiator Corporation refused to pay the installment of interest which then became due on its outstanding debentures (R., 8; 31).

The refusal to pay was not because of lack of funds.

On February 1st, 1931, the National Radiator Corporation was solvent and liquid and able to discharge in full, in cash, every obligation then due and payable. In the Plan and Agreement (Schedule B, annexed to the bill, R., 31-43) is a financial statement of the company's condition as of December 31st, 1930, just one month before (R., 32-33). It discloses that on that day the company had a net worth of $8,134,643.01; its assets were $19,434,548.08; its liabilities, including the outstanding debentures, were $11,299,905.07.

Especially noteworthy and impressive is the statement of its current assets and current liabilities. On December 31st the quick current assets of the company were $5,054,007.30 and of that $1,701,899.94 was in cash (R., 32). Its current liabilities at that time were $491,895.72 (*only $46,787.60 was presently due,* R., 33) and included therein was $293,339.58 accrued interest upon its outstanding debentures computed to December 31st, 1930. **The ratio of cash to current liabilities was more than**

3½ to 1. The ratio of current assets to current liabilities was more than 10 to 1.

It is therefore apparent that on February 1st, 1931 the company could have paid all its current debts including the interest on the debentures out of cash alone and there would still have remained in cash $1,200,000.00, and none of the other current assets would have been affected.

The company was manifestly solvent and liquid. Its refusal to pay the interest upon the outstanding debentures was unconscionable.

The explanation given by the company's management for the refusal to pay the interest on February 1st, 1931, is that the cash was needed as working capital for an anticipated increase of business; for the carrying of larger inventories; and for the purchase of new machinery and equipment, in order to maintain the corporation's competitive position in the industry (R., 34). A further explanation was that the outlook for the immediate future was obscure (R., 34).

Not only was the payment of interest omitted, but for the reasons given the company had decided to reorganize in order to scale its funded debt and thus drastically reduce its fixed charges (R., 8; 34).

On February 11th, 1931, ten days after the default, a reorganization committee appointed by the company (R., 34) promulgated a plan of reorganization (R., 8) and appointed the Bankers Trust Company, the Trustee of the debentures, depositary under the plan (R., 9; 40). This committee inaugurated by and acting in behalf of the company, purports to represent debentureholders, preferred stockholders and common stockholders (R., 31; 40).

The plan, however, is all in the interest of the company, discriminates between debentureholders and other creditors of equal rank, contains no provision for any

new capital and makes no provision for non-assenting debentureholders.

The plan contemplates the organization of a new corporation to which are to be transferred all the assets of the old corporation (R., 35). The capital structure of the new corporation is to be as follows (R., 36):

	Authorized	*To Be Presently Outstanding*
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares	272,966 shares

The new debentures bear interest at the rate of 5% per annum which, however, is payable only out of income (R., 37).

Merchandise and service creditors are to be paid in full by the new company unless they shall have been previously paid by the old (R., 36).

Debentureholders, however, are to receive for each $1,000.00 principal amount of old debentures $500.00 principal amount of new debentures, 5 shares of new preferred stock and 20 shares of new common stock (R., 39).

The holders of present preferred stock are to receive, share for share, common stock of the new corporation. Holders of the present common stock are to receive stock warrants of the new company in the ratio of 1 to 3, namely, one stock warrant of the new company for each three shares of the old, upon payment to the Reorganization Committee of $1.00 for each warrant issued (R., 39). Holders of the warrants are entitled to purchase,

on or before July 1st, 1941, shares of common stock in the new company upon payment of $20.00 per share (R., 39).

Although the preferred stock is issued without par value, the holders of such stock upon involuntary liquidation are entitled to $100.00 a share, and on voluntary liquidation to $115.00 a share, thus placing the value of $100.00 a share upon said stock (R., 38).

The common stock is also without par value but the valuation placed on that stock in the scheme of reorganization is $20.00 per share, the price at which it may be purchased, by the holders of warrants, on or before July 1st, 1941 (R., 39).

Giving effect, therefore, to the valuations placed on the securities to be issued, the capital of the reorganized corporation is $16,175,320.00, which is made up as follows:

15-Year 5% Debentures	$ 5,358,000.00
$7 Preferred stock no par value at $100.00 per share	5,358,000.00
272,966 shares at $20.00	5,459,320.00
Total	$16,175,320.00

On August 1st, 1931, the company also refused to pay the installment of interest which then became due upon the outstanding debentures (R., 9). A large number of debentureholders refused to assent to the plan, demanded payment of their interest and threatened suit when such payment was refused (R., 11). Thereupon, the bill in the primary cause was filed by the Reorganization Committee; the National Radiator Corporation appeared and consented to the decree (R., 44), and the decree appointing receivers and enjoining creditors was entered (R., 46).

There is no allegation anywhere in that bill or in the answer that the corporation was then unable to pay its debts as they matured in regular course; nor is there any allegation that the company was insolvent or in imminence of insolvency.

There is nothing in the record to show that on October 9th, 1931, the financial condition of the company was substantially different from what it had been on February 1st, 1931. The only statement of the company's financial condition submitted to the court, at the time of the making of the decree, was the statement of December 31st, 1930 (R., 32-33), which is contained in the Plan and Agreement annexed to the bill of complaint, and in the absence of proof to the contrary, the only inference that can be drawn is that it substantially represents the condition of the company at the time that it was submitted.

It was apparent to the court, at the time of the making of the decree, that the National Radiator Corporation was not insolvent or in imminence of insolvency. The principal of the debentures was not due until August 1st, 1947, sixteen years later; and the corporation had ample funds with which to pay and discharge in full, in cash, all its debts presently due and payable, including the arrears of interest upon the debentures.

Nor is there any pretense on the part of the respondents that the company was insolvent or in imminence of insolvency. **The objection was only to the payment of the accrued interest upon the debentures** (R., 10), **but not to the payment of the other debts of the corporation which were to be assumed by the new company if not previously paid by the old** (R., 36). The respondents implicitly concede the solvency of the corporation.

The Circuit Court of Appeals in its opinion, per Woolley, C. J., says (R., 62):

"Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. * * *"

The interposition of a court of equity was asked not on the ground of insolvency, present or imminent, but because (R., 10):

"The defendant has no means at hand with which to *meet, pay or satisfy the interest charges on the Debentures* overdue as aforesaid, without seriously *jeopardizing* the ability of the defendant to continue its business and without making it *difficult or impossible* for the defendant to secure necessary supplies, materials and labor to continue the operation of its plants and the sale of its products. * * *" (Italics ours.)

The suit was instituted because (R., 11):

"Certain holders of the Debentures not deposited with the complainants have threatened to bring suits in respect of interest due on their coupons and may levy execution upon the property of the defendant. * * *"

The parties to that cause thus expressly admit that the suit was instituted to prevent creditors who refused to assent to the plan of reorganization, from collecting the interest upon their debentures (R., 11) and to coerce them into subjection to the plan or else to wipe them out.

The complainants sue as creditors for the sum of $567,840.00 (R., 9-10), the unpaid interest upon the bonds deposited with them. But, although it is apparent that the company could, out of the funds in its possession,

pay all creditors whose debts had matured, including themselves, they do not demand judgment upon which they could levy execution. Instead, without explaining how it would come to pass, they aver that (R., 11):

> "* * * An attempt by the complainants to enforce their claim as a general creditor would precipitate immediate action on the part of other creditors of the defendant in different courts, and, unless this Court will take jurisdiction in this cause for the protection of every interest in the property and assets of the defendant, the result will be a multiplicity of suits, a race of diligence, wasteful strife and controversy; attempts will be made to obtain judgments and priorities; levies will be made upon the working capital, materials and supplies indispensable to the operation of the business of the defendant and this will result in the dismantling and dismemberment of its properties and *will greatly interfere with and ultimately* prevent the defendant from continuing to operate its properties, *and will result in dissipating the administrative, technical and sales forces of the defendant, which cannot be reassembled without great cost, and in destroying the confidence of the customers of the defendant and the cancellation of many orders now on its books.* * * *" (Italics ours.)

In their prayer for relief they ask (R., 12-14):

> 1. That the court ascertain and determine the rights of the complainants and other creditors of the National Radiator Corporation.
>
> 2. That the court take jurisdiction of its assets and property.

3. That receivers be appointed.

4. That the property, assets and business of the corporation be sold as an entirety and the proceeds distributed.

5. That all creditors of the company be enjoined from interfering with its assets and property.

6. The usual prayer for other and further relief and for subpoena.

The reason for all this is quite clear.

The Indenture expressly provides that in the event of a sale by the company of its property as an entirety, the obligations of the debentures shall be assumed by the new company (R., 29-31). It is therefore obvious that the suit was instituted to compass the transfer of the property and business of the National Radiator Corporation free from those obligations. As stated by Judge Gibson in his opinion (R. 52):

> "* * * The bill was specifically stated to be for the purpose of bringing about a reorganization of the defendant company. * * *"

We have thus set forth, briefly, the state of the record in the primary cause at the time of the filing of the petitioner's bill.

The appeal in this cause was heard by the Circuit Court of Appeals for the Third Circuit at the same time as the appeals from decrees in the primary cause and the Circuit Court of Appeals rendered a single opinion, per Woolley, C. J. (R., 59).

The grounds upon which the exercise of jurisdiction by the District Court was sustained have been fully discussed by us in the case of Arzt and Ramsey, Petitioners, v. Flershem, et al., No. 64.

Specification of Errors.

The petitioner relies upon the Specification of Errors set forth in the brief submitted in support of the Petition for the Writ of Certiorari, which are as follows:

1. The Circuit Court of Appeals erred in not reversing the decree of the District Court, dated May 31st, 1932, and in not vacating the decree and dismissing the bill of complaint in the primary cause as to the petitioner and all other creditors who did not assent to the plan of reorganization.

2. The Circuit Court of Appeals erred in holding that the jurisdiction over the subject matter in the primary cause existed and was properly exercised.

3. The Circuit Court of Appeals erred in holding that the exercise of jurisdiction in the primary cause did not constitute a taking of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

Argument.

Since in this case we challenge the jurisdiction of the court in the primary cause upon the same grounds as those set forth in the companion case of Arzt and Ramsey, Petitioners, v. Flershem, et al., No. 64, now also before this Court, we shall, to save repetition, rest upon the arguments submitted by us in that case, to which we respectfully refer this Court.

Conclusion.

For the reasons therein stated, we respectfully submit that the decrees of the Circuit Court of Appeals and

the District Court in this cause should be reversed and adjudged void as to all creditors who have not assented to the plan of reorganization.

Respectfully submitted,

DAVID M. PALLEY,
of New York, N. Y.,

CHARLES H. SACHS,
LOUIS CAPLAN,
of Pittsburgh, Pa.,
of Counsel.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 765.

LILY CLAPIER,

Petitioner,

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and NATIONAL RADIATOR CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS AND FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for the Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 965.

LILY CLAPIER,

Petitioner,

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and NATIONAL RADIATOR CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS AND FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported, but printed copies have been filed with the Record. The opinion of the District Court is not yet reported, but appears at page 79 of the Record.

Jurisdiction.

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347a).

Introductory Statement.

The present petition is one of three applications by holders of approximately 2% in aggregate of the total outstanding indebtedness of National Radiator Corporation for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Third Circuit filed March 24, 1933, affirming a final decree of sale and the decree confirming the sale of the property of the debtor corporation, in a suit instituted in the United States District Court for the Western District of Pennsylvania by the respondents as holders, under a Reorganization Plan, of more than 95% of the total outstanding indebtedness of said corporation. The two other applications are entitled, respectively, "First National Bank of Cincinnati and International Heater Company, Petitioners, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and others, Respondents," at Nos. 962-963, and "Amy Arzt and Josephine Ramsey, Petitioners, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and others, Respondents," at No. 964.

The decision of the United States Circuit Court of Appeals, sought now to be reviewed, disposes of two appeals in the main proceeding below (entitled "Rudolph B. Flershem, et al., as the Reorganization Committee, etc., Complainants, against National Radiator Corporation, Defend-

ant, at No. 2558 In Equity") and the petitioner's separate appeal from a decree of the United States District Court for the Western District of Pennsylvania dated May 31, 1932, dismissing the petitioner's bill of complaint in a dependent suit, on the ground that "said bill does not state facts constituting a cause of action, and is without equity" (R. 82). By this dependent bill, the petitioner attacked the jurisdiction of the District Court to appoint receivers by its decree entered October 9, 1931 (R. 71), in the main proceeding. We respectfully request leave to refer to our two briefs in the separate applications for certiorari in the main proceeding, with the same effect as if the pertinent matters therein were set forth at length in this brief, in so far as the petitioner in her present petition presents for review the same questions presented in the companion petition of Amy Arzt and Josephine Ramsey, at No. 964.

ARGUMENT.

I. The petitioner's dependent bill was properly dismissed on the ground that it appears on the face of said bill that it does not state facts sufficient to constitute a cause of action and is wholly without equity.

The sufficiency of the petitioner's dependent bill must be determined by an examination of that bill itself. A reference to it shows its charges of fraud and collusion to be couched in language so general as to fail to state facts sufficient to constitute a cause of action. "A wholesale charge of fraud and collusion does not satisfy the degree of

particularity and definiteness required by the rules of pleading."

Rospigliosi v. *New Orleans M. & C. R. Co.* (C. C. A. 5th Cir., 1916), 237 Fed. 341, at 345.

So far as concerns the petitioner's contention that the sufficiency of her dependent bill is supported by the insufficiency of the bill of complaint in the main proceeding (which is made a part of her dependent bill), we submit that the bill of complaint in the main proceeding does state a good cause of action in equity, warranting the appointment of receivers. It conforms fully to the principles frequently enunciated by this Court and the Circuit Courts of Appeals in numerous cases, among others, the following:

Re Metropolitan Railway Receivership (1908), 208 U. S. 90;

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265;

In re Babcock (C. C. A. 7th Cir., 1928), 26 Fed. (2d) 153.

The bill of complaint (with its exhibits) in the main proceeding shows the debtor corporation to have suffered losses of about $1,250,000 or $1,300,000 a year (R. 50); that its interest and sinking fund charges amounted to $1,107,852 a year (R. 34); that if payment of these fixed charges were continued, it was a matter of a short time only before all cash resources of the debtor would be utterly exhausted (R. 16), and that insolvency in every sense of the word was inevitable and, at the time the bill was filed, was imminent (R. 16).

The fact that the Plan of Reorganization had been issued prior to the receivership presents no element of novelty in legal principle. Nor does the fact that the debtor's board of directors had in principle approved some form of reorganization. The normal eventual result of practically every equity receivership of a large corporation is reorganization. Every corporation which admits the allegations of the conventional creditors' bill and consents to the appointment of receivers knows that it is, in effect, consenting to a reorganization, which presumably will be dictated by its creditors and will involve a scaling down of fixed charges. While in the ordinary case the plan of reorganization may not be promulgated or even formulated at the time the creditors' bill is filed, the plan is always promulgated before the entry of a final decree. What the creditors propose to do with their debtor's property, if they get it, does not condition their right to relief. Said Judge Hough in *Conley* v. *International Pump Co.* (S. D. N. Y., 1915), 237 Fed. 286, at 288:

> "It is certainly a curious conception of practice which leads a small body of shareholders to seek to answer a foreclosure bill merely because they are dissatisfied with what the foreclosing complainant says out of court it hopes or even intends to do after the final decree is procured."

II. The questions presented for review by the present petition relate to matters which have transpired or been disposed of subsequent to the filing of the petitioner's dependent bill.

The petitioner's dependent bill was filed December 11, 1931 (R. 2); the respondents Reorganization Committee filed their motion to dismiss the same January 19, 1932

(R. 77); the District Judge, simultaneously with his opinion in the main proceeding, handed down a separate opinion May 31, 1932, accompanying the decree dismissing the petitioner's dependent bill of complaint. In that opinion he said in part (R. 81):

> "An examination of the bill of complaint has convinced us that the motions of the defendants should be sustained. The bill is couched in the most general terms and, while charging improper collusion between the defendants, sets out nothing in a specific way from which any fraud upon complainant is to be inferred.
>
> "Incidentally, we may say that we have heard like charges in the original case (No. 2558 In Equity), but the evidence did not tend to sustain them. We shall this day file a decree in that case. The evidence indicates that the primary suit was along conventional lines. See *Continental &c. Trust & Savings Bank* v. *Allis-Chalmers Co.*, 200 Fed. 600; *In re Babcock*, 26 Fed. (2d) 153; *Re Metropolitan Railway Receivership*, 208 U. S. 90; *Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626; *Guaranty Trust Co.* v. *C. M. & St. P. Ry. Co.*, 15 Fed. (2d) 434.
>
> "We are entirely satisfied that the original case was within the jurisdiction of the court, and that the appointment of receivers therein was justified."

As appears from the Record in the main proceeding, Bankers Trust Company, as Trustee and judgment creditor for the sum of $11,674,240.21, subsequent to the filing of the petitioner's ancillary bill, intervened in the main proceeding January 9, 1932, joined in each and every prayer for relief contained in the original bill of complaint in the main proceeding, including the prayer for a sale of the

debtor's property, and, by the District Court's decree entered May 31, 1932, such property has been sold. The receivership to all intents and purposes has thereby been concluded. Whatever may have been the jurisdiction of the District Court to appoint receivers for the debtor's property, its jurisdiction to decree and to confirm the sale thereof (by way of equitable execution of the judgment creditor's claim) is not under attack in this dependent suit.

As an aid to final process, the appointment of Federal equity receivers in a proper case is necessarily "due process".

Re Metropolitan Railway Receivership (1908), 208 U. S. 90;

Superior Oil Corporation v. *Matlock* (C. C. A. 10th Cir., 1931), 47 Fed. (2d) 993;

Hatch v. *Morosco Holding Co.* (C. C. A. 2nd Cir., 1931), 50 Fed. (2d) 138;

Kingsport Press, Inc. v. *Brief English Systems, Inc.* (C. C. A. 2nd Cir., 1931), 54 Fed. (2d) 497.

Thus, in reality no constitutional question is presented. This Court has heretofore refused to entertain an appeal from a decree dismissing a dependent bill, when jurisdiction for the dependent suit rested solely upon its dependent nature, as here, and the late attempt to raise a constitutional question did not avail to sustain an appeal to this Court, in

Carey v. *Houston & Texas Central R. R. Co.* (1896), 161 U. S. 115.

The petitioner has disclosed no error requiring review by this Court.

The specifications of error made in the petitioner's brief at page 14 are directed to the Record in the main proceeding, which is not the subject of review in the petitioner's present application from the decree of the Circuit Court of Appeals in affirmance of the District Court's decree, which dismissed her dependent bill.

CONCLUSION.

The petition for writ of certiorari should be dismissed with costs.

Respectfully submitted,

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,

Counsel for Respondents RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 65

LILY CLAPIER,

Petitioner,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.,

Respondents.

BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE.

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for Respondents Reorganization Committee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 65

LILY CLAPIER,

Petitioner,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.,

Respondents.

BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONER LILY CLAPIER.

Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 64 Federal Reporter (2d Series) at page 847, *et seq.*, and appears in the printed Transcript of Record at pages 59-69, inclusive. The opinion of the District Court is not reported but appears in the printed Transcript of Record at pages 51-53.

Jurisdiction

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., § 347a).

Counter-Statement of the Case

This case had its inception December 11, 1931, with the filing in the District Court of the United States for the Western District of Pennsylvania of the petitioner's dependent bill (R. 2), contesting the appointment of Receivers in the cause then pending in that Court entitled "Rudolph B. Flershem, Charles O. Cornell, John H. Waters, *et al.*, as the Reorganization Committee, etc., Complainants, *v.* National Radiator Corporation, Defendant, No. 2558 in Equity", sometimes called the "primary cause". The primary cause itself is before this Court for review at Nos. 62, 63 and 64. The petitioner's dependent bill was in the nature of a demurrer to the creditors' bill filed by the Respondents in the primary cause (R. 6), the defendant Corporation's answer thereto (R. 44), and the order entered thereon October 9, 1931, appointing Receivers (R. 46). To this dependent bill the Respondents (as complainants in the primary cause) filed a motion to dismiss (R. 50), on the ground that said bill was wholly without equity and failed to state facts sufficient to constitute a cause of action. The District Court, concurrently with the decree of sale entered May 31, 1932 in the primary cause, dismissed the petitioner's bill (R. 53), stating (R. 52, 53):

> "The bill is couched in the most general terms and, which charging improper collusion between the

defendants, sets out nothing in a specific way from which any fraud upon complainant is to be inferred.

"Incidently, we may say that we have heard like charges in the original case (No. 2558 In Equity), but the evidence did not tend to sustain them. * * *

"We are entirely satisfied that the original case was within the jurisdiction of the court, and that the appointment of receivers therein was justified."

Counsel for the petitioner thereafter appeared at the hearing on confirmation of sale held August 18, 1932, to object on behalf of other petitioners against confirmation of the sale and the District Court's approval of the Reorganization Plan sponsored by the Respondents. In consequence, as the petitioner's brief (page 12) states, this is a "companion case of *Artz and Ramsey, Petitioners,* v. *Rudolph B. Flershem, et al.,* No. 64 now also before this Court". The grounds upon which the exercise of jurisdiction by the District Court was sustained are in consequence discussed by counsel for the petitioners in their brief in the case of *Artz and Ramsey, Petitioners,* v. *Rudolph B. Flershem, et al.,* No. 64 upon the calendar of this Court. Since in our own answering brief we deal with the merits of the primary cause, to save repetition, we rest upon the arguments submitted by us in our other briefs, to which we respectfully refer this Court.

Conclusion

Upon the ground that all proceedings in the primary cause have been properly taken by the District Court and have in all respects been affirmed by decree of the Circuit Court of Appeals, we respectfully submit that the decree

of the Circuit Court of Appeals affirming the decree of the District Court dismissing the petitioner's ancillary bill be affirmed.

Respectfully submitted,

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for Respondents Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

SUPREME COURT OF THE UNITED STATES.

Nos. 62, 63, 64 and 65.—October Term, 1933.

First National Bank of Cincinnati, et al., Petitioners,		
62	*vs.*	
Rudolph B. Flershem, et al.		
First National Bank of Cincinnati, et al., Petitioners,		On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
63	*vs.*	
Rudolph B. Flershem, et al.		
Amy Arzt, et al., Petitioner,		
64	*vs.*	
Rudolph B. Flershem, et al.		
Lily Clapier, Petitioner,		
65	*vs.*	
Rudolph B. Flershem, et al.		

[January 8, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, which are here on certiorari to the Circuit Court of Appeals for the Third Circuit, (289 U. S. 722), were argued together. They arise out of the Plan of Reorganization of the National Radiator Corporation of Delaware dated February 11, 1931. The Reorganization Committee sought to effectuate its Plan through securing, in a suit filed in the western district of Pennsylvania, the appointment of receivers and a judicial sale of the property. In that suit the federal jurisdiction was invoked on the ground of diversity of citizenship; the original plaintiffs being citizens of states other than Delaware and one of them a citizen of the district in which the suit was brought. The Corporation, a citizen of Delaware, was the sole defendant. The District Court appointed receivers, and entered decrees ordering the sale, confirming it, approving the Plan, and directing the receivers to convey and deliver to the purchaser the entire property. The Circuit Court of Appeals affirmed the decrees. 64 F. (2d) 847. The

petitioners in No. 64 urge that the final decrees should be reversed as to them on the ground that the court lacked equity jurisdiction or that the bill lacked equity. The petitioners in numbers 62 and 63 urge that the decrees should be reversed as to them mainly because the property was sold at a grossly inadequate price. The petitioner in No. 65 is the plaintiff in a bill of review, brought in the same court, praying that the order appointing receivers be vacated. Its dismissal, which was affirmed on appeal, is alleged to have been erroneous.

In August, 1927, National Radiator Corporation was organized to effect a merger of six independent manufacturers of radiators and boilers for heating purposes. The net assets of the consolidated corporation, which included ten manufacturing plants located in five states and warehouses in four others, were valued at $26,192,-261.72. The capital was represented by 270,000 shares of no-par common stock; 60,000 shares of $7 cumulative convertible no-par preferred stock; and $12,000,000 twenty-year 6½ per cent sinking fund gold debentures. These had been underwritten, and were marketed, by J. & W. Seligman & Co. and Bankers Trust Company of New York. The terms governing the issue of the debentures and the rights and remedies of the holders thereof were fixed by an indenture between the Corporation and the Bankers Trust Company, as trustee.

In January 1931, the management of the Corporation concluded, after months of consideration and conference with the bankers, that a revision of its capital structure was desirable in order to effect a drastic reduction of the debenture liability and the elimination of all fixed charges; and that, to this end, default should be made in the payment of the February 1, 1931 interest on the debentures. Before the merger, the constituent concerns had operated successfully for many years. After the merger the business ceased to prosper. By the end of 1931, all but three of the ten manufacturing plants had been closed; the outlook for the immediate future was obscure; and there was no definite promise of an early recovery in earning power.[1]

A meeting of the Board of Directors was called for the purpose of taking formal action in respect to the payment of the February

[1]The Corporation acquired by the merger ten plants. Two at Johnstown, Pa.; two at New Castle, Pa.; one at Framingham, Mass.; one at Trenton,

1, 1931 interest. Although the Corporation had suffered (including depreciation and sinking fund charges) large losses in each of the years 1928, 1929 and 1930, its financial condition was still excellent. On December 31, 1930, the ratio of current assets to all current liabilities was more than 10 to 1; the current assets, including raw material and stock in process and manufactured, being $5,054,007.30. The ratio of cash on hand to all current liabilities was then 3½ to 1. It had $1,701,899.94 cash and $1,132,563.17 in good accounts receivable; whereas its debts presently payable were only $46,787.60 (besides $293,339.58 for semi-annual interest accrued on the debentures but not payable until February 1, 1931, $151,768.54 of accrued taxes and like items, and $60,000 in notes payable in one, two and three years). The twenty-year debentures outstanding had been reduced from $12,000,000 to $10,716,000.[2]

After presenting to the Board the December 31, 1930, financial statement, the Chairman said:

"That although the working capital of the Company as shown by the balance sheet was reasonably ample, it was evident that, if the Company were to do an increasing volume of business, it would require the use of all or a substantial part of this cash to carry larger inventories and receivables, and that it would also be necessary to make large expenditures for the design of new products and for equipment necessary in their manufacture. Otherwise, the Chairman pointed out it might well prove to be impossible to maintain the Company's competitive business as against other enterprises in the industry. The Chairman then referred to the fact that the management had considered the advisability of a reorganization and had requested Messrs. Rudolph B. Flershem [the Chairman of its Executive Committee], Charles O. Cornell [a member of a firm specializing in reorganizations] and John H. Waters [the corporation's President] to act as a Committee to consider the matter and to formulate a Plan of Reorganization which might be submitted to the security holders of the Company. The Chairman reported that this Committee was

N. J.; one at Chicago, Ill.; and one each at Utica, Dunkirk and North Tonawanda, N. Y. One plant had been sold in 1927 and one was shut down. Two were closed early in 1929. In 1930 one plant was shut down because of the decline in business, and one in 1931 before the receivers were appointed.

[2]On December 30, 1931, at which time Banker's Trust Company, trustee for the debenture holders, recovered judgment for the entire principal outstanding, the amount had been further reduced to $10,673,000.

now considering the matter of reorganization and had formed the opinion that a reorganization was advisable."

The recommendations of the management were adopted by the Board of Directors. It was voted to default in the payment of the February 1 interest; the holders of the debentures were notified that the default was deemed advisable in order to conserve the Corporation's cash resources; and, under date of February 11, 1931, an elaborate "Plan and Agreement of Reorganization" was submitted to the security holders for acceptance.

The Plan did not provide for raising additional capital. It was directed solely to reducing the liability on the debentures and eliminating all fixed charges. It provided that a new corporation be organized which would take over all the assets of the existing one, continue the business, and pay in cash all the current debts for merchandise and services; that the debenture indebtedness be scaled by giving for each $1,000 of the 6½% twenty-year sinking fund debentures, $500 of the new corporation's 5% fifteen-year income debentures (without sinking fund provision),[3] 5 shares of its $7 preferred stock (entitled to $100 a share on involuntary liquidation and $115 a share on voluntary liquidation) and 20 shares of its common stock. Holders of the preferred stock in the existing company were to receive therefor, share for share, common stock in the new; and holders of the common stock of the existing company might (upon payment of $1), receive for every three shares a stock warrant, entitling the holder to purchase on or before July 1, 1941, one share of common stock in the new company upon payment of $20 per share. The Plan made no provision for dissenting debenture holders.

The Reorganization Committee proceeded to solicit deposits of securities under the Plan. Before September 15, 1931, it had secured the deposit of about 81 per cent of the debentures and a large part of the preferred and common stocks. On that day it declared the Plan operative. On the same day it made a settlement with an opposing bondholders' protective committee,[4] whereby

[3]Moreover, the existing debentures were entitled to be secured by a prior lien against any subsequent mortgage; the new debentures were entitled only to an equal lien with any subsequent mortgage. The Committee later agreed with an opposition committee (see note 4) that the lien should be prior.

[4]The opposition committee were to receive $35,000 for fees and expenses of the members and counsel; and one of its members, to be designated by the Reorganization Committee, was to become a member of the latter and of the board of directors of the new company.

it secured additional deposits of about 9 per cent of the debentures. Later, other deposits were received; so that ultimately more than 95 per cent of all outstanding debentures were deposited under the Plan.

Some holders of non-assenting debentures demanded payment of their overdue coupons, including those for the August 1, 1931 interest. When payment was refused, the holders of $24,000 of the debentures brought an action therefor; and counsel gave notice of intention to bring a further action on coupons attached to others. In order to frustrate these attempts to collect the interest, and in order to compel the minority debenture holders to acquiesce in the Plan of Reorganization, the Committee commenced, on October 5, 1931, this suit praying for the appointment of receivers with power to continue the business; for a sale of the properties as an entirety; and that meanwhile all creditors be enjoined from enforcing their claims. The bill set forth the existing capital structure, the defaults in the payment of interest, and the Plan of Reorganization. It did not allege that the corporation was unable to pay the interest; or that it was insolvent; or that its assets while ample were not then available for payment of its debts. The bill alleged merely that:

"The defendant has no means at hand with which to meet, pay or satisfy the interest charges on the Debentures overdue as aforesaid without seriously jeopardizing the ability of the defendant to continue its business and without making it difficult or impossible for the defendant to secure the necessary supplies, materials and labor to continue the operation of its plants and the sale of its products."

"[That] certain holders of the debentures not deposited with the complainants have threatened to bring suits in respect of interest due on their coupons and may levy execution upon the property of the defendant." . . . "[That] unless the Court will take jurisdiction in this cause for the protection of every interest in the property and assets of the defendant, the result will be a multiplicity of suits, a race of diligence, wasteful strife and controversy;" and dismemberment of the properties [and that] "It is to the best interests of the defendant and the complainants and other creditors of the defendant that the going concern value of the defendant's business and properties should be maintained", etc.

On October 9, 1931, the Corporation entered its appearance; filed an answer admitting the truth of the allegations contained in the bill; joined in the prayers thereof; and consented to the

appointment of receivers. On the same day receivers were appointed with power to continue the business; and creditors were restrained from enforcing their claims against the property. One of the receivers was Robert S. Waters, a Vice-President and General Manager of the Corporation and the son of John H. Waters, its President, Chairman of its Board of Directors and member of the Reorganization Committee. The other receiver was William G. Heiner, a Pittsburg lawyer. With like consent, ancillary receivers were appointed in ten other jurisdictions in which the Corporation had property; and also in Delaware where it had none.

When the bill was filed, and when the receivers were appointed, the Corporation could have paid from the cash on hand all overdue debenture interest, as well as all its other current liabilities, without impairing its ability to continue the business. The cash on hand was $1,257,381.59.[5] The overdue interest amounted then to $709,3[illegible]9.[6] That $547,985.90, the difference between these two amounts, was more than the amount required for working capital is demonstrated by action of the receivers. Two weeks after their appointment, they applied for and obtained from the court leave to invest "such amount or amounts of cash of the receivership estate as in the judgment of the receivers is not needed at the time for expenses and working capital." Thereupon, they invested $1,030,000 of the cash in United States treasury certificates of indebtedness and in bank certificates of deposit.

The Bankers Trust Company, as trustee for the debenture holders, cooperated in all respects with the Reorganization Committee; served as depositary under the Plan; made formal demand for payment of the overdue interest; and brought, with leave of court, suit for the amount of the overdue interest on all outstanding debentures and recovered judgment therefor; thereupon declared the principal of the debentures immediately payable; recovered judgment therefor on December 30, 1931; and then intervened in the receivership suit as plaintiff.

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[5]On the day of their appointment, the receivers had also $1,494,327.22 in sound receivables and at least $34,534.40 in securities convertible in cash.

[6]The aggregate of other current liabilities (including amounts not then payable) was only $157,511.89. There was besides the August 1, 1931 requirement for the sinking fund. But the debentures held by the Corporation applicable for this purpose reduced the requirement of cash to $43,918.50.

In due course, application was made for an order of sale. The District Court did not make an appraisal by independent experts. In fixing the upset price and in confirming the sale, it relied practically upon the evidence given, or introduced, by officers of the Corporation and the members of the Reorganization Committee. On May 31, 1932, the decree ordering a sale was entered; the upset price was fixed at $2,500,000; and a date after the sale was set for a hearing on its confirmation and on the fairness of the Plan. An appeal from this decree was taken forthwith. At the sale, held August 8, 1932, the property was purchased in behalf of the Committee for $2,550,000 cash. The purchasers assigned their rights to the new company, National Radiator Corporation of Maryland, which agreed to enter an appearance in this cause; and upon the petition of the purchasers and the new company, a decree was entered finding the Plan fair; confirming the sale; and directing that the property be transferred to the new Corporation free and clear of all obligations to creditors of the old. Thereupon, the assets were conveyed to the new company, over the objection of some of the petitioners that the appeal already filed rendered the court powerless to take or approve further action. The same counsel acted for the Reorganization Committee, the receivers and the new company.

While all the petitioners refused assent to the Plan and all appealed to the Circuit Court of Appeals from action of the District Court, the differences in their several positions and contentions are such as to require separate consideration of their legal rights.

First. Amy Arzt and Josephine Ramsey, the petitioners in No. 64, hold $121,000 of the debentures. They appeared specially at the hearing on the confirmation of the sale; objected, among other things, on the ground that the court lacked equity jurisdiction of the subject matter; appealed to the Circuit Court of Appeals from the decree affirming the sale; and contended there and here that, since they refused assent to the Plan, the decree should, as to them, be declared void, and reversed. Whether strictly there was lack of equity jurisdiction, we need not decide. Compare *Burnrite Coal Co.* v. *Riggs,* 274 U. S. 208; *Lion Building and Surety Co.* v. *Karatz,* 262 U. S. 640; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491. For the suit is clearly without equity. The court's power was invoked for a purpose for which it may not be exercised.

We have no occasion to consider under what circumstances a court of equity may, through appointment of receivers and judicial sale, lend aid to protect the interests of creditors and effect a reorganization of an insolvent corporation.[7] Nor need we consider under what circumstances a court of equity may, because the assets of a corporation are ample to meet all liabilities but cannot then be immediately converted into cash, properly appoint receivers in order to preserve values and prevent unequal treatment of creditors.[8] The case before us is of a different character. The possibility of insolvency was not mentioned when the board of directors voted to make default in the payment of the semi-annual interest on its funded indebtedness and approved the Plan of Reorganization. While defaulting on its debentures, the Corporation continued its business operations and paid promptly its merchandise and other unfunded indebtedness. Insolvency was not present, or imminent.

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[7] All the cases in which this Court appears to have exercised this power in aid of reorganization upon the ground of insolvency dealt with railroads or other public utilities where continued operation of the property and preservation of its unity seemed to be required in the public interest. Milwaukee & Minnesota R. Co. *v.* Soutter, 2 Wall. 510; Davis *v.* Gray, 16 Wall. 203; Union Trust Co. *v.* Illinois Midland Ry., 117 U. S. 434; Wallace *v.* Loomis, 97 U. S. 146; Wood *v.* Guarantee Trust Co., 128 U. S. 416; Quincy, Missouri & Pacific R. R. Co. *v.* Humphreys, 145 U. S. 82; Louisville Trust Co. *v.* Louisville R. Co., 174 U. S. 674; Re Metropolitan Receivership, 208 U. S. 90; Kansas City R. Co. *v.* Central Union Trust Co., 271 U. S. 445; compare Sage *v.* Central R. R. Co., 99 U. S. 334; Shaw *v.* R. R. Co., 100 U. S. 605. Moreover, in all those cases the sale was made upon foreclosure. In Brown *v.* Lake Superior Iron Co., 134 U. S. 530, and Leadville Coal Co. *v.* McCreery, 141 U. S. 475, where the defendant corporation had allowed the receivership of a rolling mill to proceed nine months without answering and creditors did not object until after the decree of sale, this Court refused to decide whether originally the suit should have been allowed to proceed.

The Act of March 3, 1933, c. 204, Sec. 77, 47 Stat. 474, amending the Bankruptcy Act, provides: "Reorganization of railroads engaged in interstate commerce. (a) Any railroad corporation may file a petition stating that the railroad corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization."

[8] In National Surety Co. *v.* Coriell, 289 U. S. 426, 435, the question before this Court was not the equity of the bill, but the propriety of the procedure pursued by the District Court when approving the plan of reorganization. Compare Michigan *v.* Michigan Trust Co., 286 U. S. 334, 343; Shapiro *v.* Wilgus, 287 U. S. 348, 356. Filene *v.* Weed, 245 U. S. 597; Riehle *v.* Margolies, 279 U. S. 218; Munroe *v.* Raphael, 288 U. S. 485.

The debentures were not to mature until 1947. Insolvency even in the remote future was not certain. This company defaulted when it was both solvent and liquid. It defaulted, although it had cash in bank equal to three and a half times its total current liabilities, including this interest. It defaulted, although the amount of the cash on hand was so large that, even if the interest had been paid, the surplus of cash remaining would have been more than was then required for working capital.

This deliberate disregard by the Corporation of the legal rights of the debenture holders is sought to be justified on the ground that the management, looking to the long future, concluded that the course taken would enure to the benefit of the business and all concerned—would benefit bondholders as well as stockholders. The default was the first step in a proposed revision of the capital structure by which the funded indebtedness would be cut in half and all fixed charges eliminated. The management, whose competency had been challenged, functioned as members of the Reorganization Committee. Having failed to obtain the assent of all the security holders to its Plan, the Committee sought the aid of a court of equity to compel the minority's acquiescence; and the Corporation joined as defendant in the prayers of the bill. Reorganization was the primary relief sought. The appointment of the receivers and the judicial sale were the device employed to effect a transfer of the assets of the existing corporation to a new one, thereby relieving both from the payment of the former's debts.[9] By these means it was hoped to subject all dissenting creditors to the condition of impotency so frequently occupied by minority stockholders.

The substantive law affords no warrant for so abridging the rights of individual creditors. There is no contention that the

[9]Unless all debenture holders assented to the Plan, it could not be effectuated except through the medium of a judicial sale. For the indenture with the Bankers Trust Company, trustee, provided that the property of the Radiator Corporation should not be sold as an entirety unless "as a part of the purchase price for the sale of the property of the company as an entirety [the purchaser] expressly assumes in writing the due and punctual payment of the principal and interest of all the debentures;" whereas the main purpose of the Plan was to cut in half the amount of the debenture liability and to eliminate all fixed charges through transferring the entire property to a new company.

corporation laws of Delaware conferred such power upon the board of directors and the majority of the debenture holders. The purpose of the transaction was to hinder and delay certain creditors. If, acting upon purported authorizations from the board of directors and all stockholders, the Radiator Corporation had sought to achieve the purpose of the Reorganization Committee by a voluntary transfer of all of the assets to a new corporation, the conveyance would have been fraudulent in law as to dissenting debenture holders. It would have been a fraudulent conveyance even if the transaction had been entered upon solely in the interest of the debenture holders, in a well-founded belief that it would prove to their advantage, and although full payment of the indebtedness had been contemplated. *Means* v. *Dowd*, 128 U. S. 273.[10] The illegality would not have been avoided by coupling the transfer later with the appointment of a receiver. *Shapiro* v. *Wilgus*, 287 U. S. 348, 354-5. Nor could the illegality be avoided by first securing the appointment of receivers and then effecting the transfer through a receivers' sale. Since the purpose was fraudulent in law, the rights of the non-assenting creditors cannot be impaired by the Corporation's admission of the self-serving allegations of the bill. Compare *Harkins* v. *Brundage*, 276 U. S. 36.

The power of the District Court was invoked, not to enforce rights of creditors, but to defeat them. The fact that the means employed to effect the fraudulent conveyance was the judgment of a court and not a voluntary transfer does not remove the taint of illegality.[11] *Jackson* v. *Ludeling*, 21 Wall. 616; compare *Jones* v.

[10] Similarly, it has been held that an assignment made for the benefit of creditors, by one who is solvent, to avoid temporary embarrassment and sacrifice of assets, is a fraudulent conveyance as to those who have not consented; and that the conveyance will be set aside to the extent necessary to permit non-assenting creditors to levy execution. Burt *v.* McKinstry, 4 Minn. 204; Gardner *v.* Commercial Nat. Bank, 95 Ill. 298.

[11] "An execution sale under a consent judgment, where the consent is, in effect, not the act of the defendant, but that of the plaintiff prosecuting the action, is in reality merely a voluntary transfer. To give it any better standing would be the grossest sacrifice of substance to form." Title Ins. & Trust Co. *v.* California Development Co., 171 Cal. 173, 210. See also, Metcalf *v.* Moses, 35 App. Div. 596; 161 N. Y. 587; Merchants Bank *v.* Burnet, 33 N. J. Eq. 486; Atwater *v.* American Exchange Bank, 152 Ill. 605; Skinner *v.* Case Threshing Machine Co., 182 N. E. 99 (Ind.); Hill *v.* Pioneer Lumber Co., 113 N. C. 173.

Railroad Co., 6 Wall. 752; *Northern Pacific R. R.* v. *Boyd*, 228 U. S. 482, 507. Nor is it material that the Corporation became insolvent later, long before entry of the order of sale, and that, but for the appointment of receivers, some non-assenting debenture holders would have obtained a preference. The lack of equity in the bill when filed is not cured by the insolvency later occurring. Compare *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491. Moreover the insolvency which supervened was precipitated by the Reorganization Committee, then the only plaintiffs in this suit. It was at their request that the Bankers Trust Company, as trustee, declared the principal of the debentures due; recovered judgment thereon for $10,673,000; and intervened as party plaintiff. These acts were steps in carrying out the Plan in which the Corporation, the Committee and the Trust Company cooperated.

The sale and reorganization being in law fraudulent as to the petitioners in No. 64, it remains to consider the relief to which they are entitled. If, as in *Shapiro* v. *Wilgus*, 287 U. S. 348, 357, the reorganization had been effected by a voluntary transfer and thereafter receivers had been appointed by the federal court, these creditors would, upon recovery of judgment, have been "entitled to an order in the alternative either for the payment of the judgment out of the assets in the hands of the receivers or in default thereof for leave to issue execution." The relief and the procedure should be the same here, although these petitioners are not judgment creditors, and the transfer followed the appointment of receivers. They should be paid in full upon establishing their claims in this case, because they were prevented by the interlocutory order appointing receivers from proceeding against the assets, fraudulently transferred, and thereby securing a lien, which would have yielded them full payment. Compare *Metcalf* v. *Barker*, 187 U. S. 165, 174; *Freedman's Savings Bank* v. *Earle*, 110 U. S. 710; *Chittenden* v. *Brewster*, 2 Wall. 191.[12]

Nothing in the indenture with the Bankers Trust Company, or in its action as trustee thereunder, interferes with affording them this relief. That instrument expressly reserves to the individual debenture holders the right to collect interest and principal in an action at law. If that right was impaired by the acts of the Trust

[12]See also Metcalf *v.* Moses, 35 App. Div. 596; 161 N. Y. 587; Johnston *v.* Straus, 26 Fed. 57.

Company, in declaring the principal of the debentures due and securing judgment thereon, equity will grant relief; because those acts, done at the request of the Reorganization Committee, were incidents of the Plan which we hold was fraudulent in law as to these petitioners.[13] The debenture holders who, by assenting to the Plan, cooperated with the Corporation and the Reorganization Committee, are in no position to complain that these petitioners will fare better than they. Compare *Davis* v. *Virginia Railway & Power Co.*, 229 Fed. 633, 642.[14] Since the assets fraudulently conveyed far exceed the amount of the claims of all non-assenting creditors, none of these could have occasion to object to the payment to these petitioners in full.

Second. Lily Clapier, the petitioner in No. 65, is the holder of $11,000 of the debentures. She refused to assent to the Plan of Reorganization, but did not seek to intervene in the receivership suit. Instead, she brought in the same court, a separate suit against the Corporation and the receivers in the nature of a bill of review. Suing on behalf of herself and all other creditors who had refused to accept the Plan, she charged that the court was without jurisdiction in equity to appoint receivers; and prayed that the decree appointing them be vacated and no further pro-

[13] The record does not show that all the debentures would not have been paid in due course under proper management, in the absence of the voluntary default made to effect the desired reorganization—and other proceedings to that end.

[14] There, in a case of reorganization, the Court said: "The holders of the bonds secured by the senior mortgages and the other debenture bondholders of the Richmond Company had the opportunity to join the petitioner in his effort to recover property which he alleged had been taken from that on which they all relied for security. They refused to enter the contest, and accepted as full payment and satisfaction of their bonds the settlement offered in the reorganization. Thus the petitioner was left as the only bondholder who chose to avail himself of the reservation and make the contest, and it follows that he alone is entitled to receive the fruit of his effort. . . . . All other creditors waived their rights, and were in the position of saying either that there was no merit in petitioner's contention, or that they were unwilling to make any effort to bring under the security the property alleged to have been diverted. Evidently, under such conditions, the property which may be recovered or brought back as a part of the assets of the Richmond Company by petitioner's efforts and expense would be applicable to his bonds. The principle is well settled by authority. Freedman's S. & T. Co. *v.* Earle, 110 U. S. 710." See, also, In re American Candy Mfg. Co., 256 Fed. 87, 88; George *v.* St. Louis Cable & Western Ry. Co., 44 Fed. 117, 120-124.

ceedings be had. The receivers and the Corporation moved to dismiss the Clapier suit on the ground that the bill failed to set forth a cause of action. These motions were granted, without passing upon the question whether in view of the fact that two of the defendants were citizens of the same State as the plaintiff, there was lack of federal jurisdiction. From the decree of dismissal she appealed to the Circuit Court of Appeals.

"A bill of review is called for only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it." *John Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 88. For this reason, a bill of review will not lie to review an interlocutory order appointing a receiver. The dismissal of the Clapier suit was, therefore, proper. But that decree should have been without prejudice to her right to prosecute her claim against the Corporation, the assets in the hands of the receivers and the new company. To this end she should be given leave to intervene in the receivership suit and there present her claim for such relief as may appear to be appropriate. As the new corporation became party to the suit when it applied for confirmation of the sale, there is here no obstacle to this procedure. Compare *National Surety Co.* v. *Coriell*, 289 U. S. 426, 438; *Kneeland* v. *American Loan Co.*, 136 U. S. 89.

Third. The First National Bank, one of the two petitioners in Nos. 62 and 63, is the holder of $68,000 of the debentures. It filed, before the hearing on ordering the sale, a petition for leave to intervene; and was permitted to do so as party defendant, but only "in subordination to and recognition of the propriety of the main proceeding." In the hearings on ordering the sale, on approving the Plan, and on confirming the sale, it took part by cross-examination of witnesses and by argument; but it did not introduce any evidence. It appealed from both the interlocutory and the final decree.

The Bank does not claim that the District Court was without equity jurisdiction or that the bill lacked equity. It concede that the court could properly lend its aid to effectuate the proposed reorganization and, to this end, might sell the assets as an entirety. Its contention is that the property held in receivership was a trust fund to be administered for the benefit of each and every creditor, and since some of the debenture holders had re-

fused to assent to the Plan of Reorganization, the court was under the duty to make the sale on such terms and under such conditions as would ensure to them, as their distributive share of the assets, the largest amount in cash which could be realized therefrom; and that the court, basing its action upon estimates offered in support of the Plan, fixed a grossly inadequate upset price and erred in confirming the sale. The respondents insist that the non-assenting debenture holders were entitled only to their distributive share of the sum for which the property could have been sold for if scrapped; and that they would, under the price paid, receive that much.

It is clear from the evidence introduced by the Reorganization Committee and the receivers that the upset price and the sale price were far below even the scrap value. The upset price fixed was $2,500,000. The entire property was sold to the Reorganization Committee for $2,550,000. At that time the cash and assets equivalent to cash alone aggregated $2,192,804.95. There was cash $1,551,615.78; and notes and accounts receivable (after deducting ample reserve for doubtful accounts) $641,189.17. Besides, there were $1,671,605.91 in raw material, goods in process and manufactured; bonds, stocks and like items valued at $88,873.41; manufacturing plants, and the warehouses in the several cities theretofore valued at $6,388,318.83; goodwill, trade marks and patents theretofore valued at $6,634,501.90; and other assets valued at $166,475.65. Moreover, the existence of the Plan of Reorganization, assented to by a vast majority of the security holders, gave assurance of at least one bidder for the entire property who had confidence that the business, if sold as an entirety as a going concern, possessed a value greater than its liquidating value; and would, if necessary to effectuate the Plan, bid for the assets in cash more than the estimated liquidating value. The upset price and the sale price were grossly inadequate.[15]

[15]It seems to have been the aim of the Reorganization Committee to have the upset price fixed at a sum which would yield to non-assenting debenture holders not more than the then market value of their bonds. At one time it has made at one of its meetings a tentative suggestion of $3,600,000. The gross inadequacy of the upset price is illustrated by the division of the $2,500,000, as applied to the ten separate parcels in which, as a formality, the property was offered before selling it as an entirety to the Reorganization Committee. Parcel A for which the upset price of $2,392,000 was set included, be-

In justifying the action taken, the Court of Appeals called attention to the fact that the non-assenting creditors had not introduced any evidence to prove their contention that the sale should not be confirmed. In view of the undisputed facts stated above, the introduction of such evidence was not indispensable. The failure to secure an adequate price seems to have been due, not to lack of opposing evidence, but to the mistaken belief that it was the duty of the court to aid in effectuating the Plan of Reorganization, since a very large majority of the debenture holders had assented to it. Moreover, the court stood in a position different from that which it occupies in ordinary litigation, where issues are to be determined solely upon such evidence as the contending parties choose to introduce. In receivership proceedings, as was held in *National Security Co.* v. *Coriell,* 289 U. S. 426, 436, every important determination by the court calls for an informed, independent judgment; and special reasons exist for requiring adequate, trustworthy information where the jurisdiction rests wholly

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sides the plants and other real estate in Pennsylvania, all the personal property except that used in connection with the plants and other real estate located in the other eight States. Parcel B embraced the plant and appurtenant real and personal property in New Jersey (including 11½ acres near Trenton and 14 dwelling houses), carried on the books at $861,179.12. The upset price on this parcel was fixed at $28,000. Parcel C embraced the plant and appurtenant real and personal property in Massachusetts (including 23 acres at Framingham), carried on the books at $592,452.64. The upset price for this parcel was fixed at $17,500. Parcel D embraced the plant and appurtenant real and personal property at North Tonawanda (including 10 acres) and Dunkirk, New York, valued on the books at $1,318,373.60. The upset price for this parcel was fixed at $37,500. Parcel E included 10 acres of land, the plants and appurtenant real and personal property and a warehouse at Chicago, Illinois, carried on the books at $605,149.43; and also the Edgewood Apartment Hotel, at Chicago, carried on the books at $51,172.31. The upset price fixed for this parcel was $17,500. Parcel F included the warehouse at Baltimore, Maryland, and the usual equipment, which was carried on the books at $33,477.93. The upset price on this parcel was fixed at $1,000. Parcel G included the warehouse equipment at Cincinnati, Ohio, which was carried on the books at $48,632.84. The upset price on this parcel was fixed at $2,250. Parcel H included the warehouse at Richmond, Virginia, which was carried on the books at $26,045.42. The upset price on this parcel was fixed at $1,000. Parcel I included two warehouses at Hempstead, New York, which was carried on the books at $30,093.51. The upset price on this parcel was fixed at $1,000. Parcel J included the warehouse at Washington, D. C., which was carried on the books at $58,536.53. The upset price on this parcel was fixed at $1,000.

upon the consent of the defendant who joins in the prayers for relief. It would be unreasonable to impose upon a few dissenting creditors the heavy financial burden of making an adequate appraisal supported by the testimony of competent experts, where, as here, the assets include extensive plants and equipment located in nine states.

The relief which the Bank seeks is that sum in cash which it would have received if the property had been sold at a proper price. To this relief it is clearly entitled. The cause is remanded to the District Court for the purpose of ascertaining the sum. In making their determination it must be borne in mind that the problem which was presented to the trial court upon the application for the receivers' sale of the assets of this manufacturing company, with its many far flung plants and warehouses, was a very different one from that with which courts have been confronted upon applications for sale on foreclosure of railroad systems. In such cases, it is ordinarily necessary that the property be sold as an entirety. The unity of the system must be preserved in both the public and the private interest, and the large amount of cash required by the upset price renders the Reorganization Committee, which ordinarily controls a large majority of the outstanding securities, practically the only bidder.[16] Compare *Kansas City Terminal Ry.* v. *Central Union Trust Co.*, 271 U. S. 445, 453-4. In the case at bar, preservation of the unity of the property was not essential. The sale of the assets in many parcels was possible; and perhaps desirable in the interest of all concerned.

A detailed appraisal must now be made of the Corporation's assets as of the date of the sale, based upon then values and the

[16]By the decree the purchaser was required to pay only $300,000 in cash, presumably to cover the expenses and fees of the Reorganization Committee, the receivers and counsel. The decree provided that on the balance of the purchase price: "The Purchaser shall be credited on account of his purchase price for Debentures and coupons and assigned claims finally established and allowed, turned over in part payment of the purchase price, with such sum as would be paid in respect of such Debentures, coupons and assigned claims out of the proceeds of sale, if the whole amount of the purchase price had been paid in cash." By this provision, customary in decrees for sales of railroad systems on foreclosure, the Reorganization Committee was relieved of the necessity of raising a large sum in cash—a necessity which naturally would deter bidders not so situated.

possibility of disposing of them in parcels, as well as an entirety; The appraisal of the current assets will present little difficulty. And the experience gained since the sale in collecting the receivables and in disposing of the inventory will be of aid. The appraisal of the property other than the current assets will require careful preparation and consideration. The inadequacy of the upset price seems to have resulted mainly from the assumption that the only alternatives were to continue to operate the properties as an entirety or to scrap all; and from a determination that the properties should not be scrapped. So far as appears, no consideration was then given to the possibility of selling the properties in such parcels as would permit of reconstituting as separate units some of the original independent concerns; or to the fact that a detailed valuation of the many items of which the assets, tangible and intangible, were composed was essential to intelligent bidding for the property in such parcels or as scrap; or to the fact that if the sale was not made as an entirety the appropriate markets for some of the parcels or lots might not be New Castle, Pennsylvania, where the sale was held. Moreover, no attempt appears to have been made then to secure bids from buyers of scrapped properties.

The history of the enterprise lends no support to the view that unless all the property was to be scrapped, all had to be sold as an entirety. The losses of the Corporation appear to have been due largely to the fundamental mistake of judgment committed in merging the several independent concerns. Before the consolidation each of the six independent concerns earned large profits. Their aggregate profits for each of the last three years before the merger had averaged $3,455,642 a year. A few months after the merger the Corporation entered upon a period of heavy losses which continued unbroken up to the time of the receivers' sale. The abrupt change from profit to loss was not the result of the general business depression. Although 1928 and 1929 were years of general business prosperity,[17] the loss of the Corporation (before payment of debenture interest) was $587,123

[17]The losses were, doubtless, due in part to the fact that already, at the end of 1927, the very lucrative "direct to the consumer" business theretofore carried on by two of the theretofore independent concerns had to be discontinued, because incompatible with the selling methods of the other plants of the consolidated company.

in 1928; and $490,371 in 1929.[18] The heavy losses during 1928, 1929 and later years (including the period of the receivership) appear to have been due in large measure to the cost of carrying unused properties. During the receivership, only the Pennsylvania plants were in operation.[19] For them there was still substantial business; and that business might then have been profitable if not burdened with the cost of carrying the many unused properties.[20] In valuing the assets the appraisers should also bear in mind that, even if part of the properties should have been sold as scrap, the Reorganization Committee was a willing purchaser for the rest.

Fourth. The International Heater Company, the other petitioner in Nos. 62 and 63, holds three promissory notes of the Corporation of $20,000 each, maturing respectively on the last days of 1931, 1932 and 1933. It refused assent to the Plan; but it does not question either that the District Court had equity jurisdiction of the cause, or that there was equity in the bill. It expressly concedes that the court could properly lend its aid to enable security holders of an unsuccessful corporation to find, through reorganization, a practical method of continuing the business. Its main objection is that under the decree entered, it is denied payment in cash of the amount to which it is entitled. The Heater Company did not learn of the application for the order of sale until after the hearing thereon had closed. Then it filed a petition to intervene; was permitted to intervene as defendant, but only "in subordination to, and recognition of, the propriety of the proceeding;" and it appealed to the Circuit Court of Appeals from both the decree ordering the sale and from that confirming it and approving the Plan. It seeks reversal of the decree on two entirely distinct and alternative grounds.

1. The Heater Company asks that, pursuant to the Plan, these notes be paid in full by the new corporation. The Plan pro-

[18] The greater part of the products of these plants was used in the new buildings. In the year 1928, the new construction in America was said to have reached its all-time record.

[19] See note 1, p. 2.

[20] During the first four months of the receivership the gross sales were $1,300,000. For the first fifty days of the receivership an operating gain of $31,917.77 was turned into a loss of $14,630.44 by reason of maintenance expense of the non-operating plants of $46,548.21.

vides that debts for merchandise or services shall be paid by the new corporation in full. These notes were part of the purchase price paid, in the latter part of 1927, for a minority interest in the stock of the Lincoln Radiator Company, the majority interest of which the Corporation had previously acquired. The Heater Company contends that the notes, being a part of the current indebtedness of the old company, and having been given for personal property, are to be deemed merchandise debts within the meaning of the Plan; but that, if the Plan as drawn does not include them, it should be amended by the court, so as to provide for the payment of the notes in full. The Court of Appeals rejected this contention. We think it was right, substantially for the reasons stated by it.

2. The Heater Company contends that, if the notes are not to be paid in full, it should receive a sum much larger than its distributive share of the purchase price paid by the new corporation. Unlike the Bank, it does not argue that the court was obliged to make an independent investigation into the value of the assets before fixing the upset price. Its contentions are that the Heater Company should not be prejudiced by its own failure to introduce evidence on that issue since it had no notice or knowledge of the hearing; that, moreover, the gross inadequacy of the price paid was due to the fact that, instead of aiming to secure for non-assenting creditors the largest possible sum in cash, the court treated the receivers' sale as merely a necessary step in effectuating the Plan of Reorganization; and hence adopted a method of selling which excluded all bidders except the Reorganization Committee. We have no occasion to discuss this argument in detail. For the reasons stated in connection with the Bank's claim, we think that the sale was made at a grossly inadequate price; and that it was invalid also as to the Heater Company. Like the Bank, the Heater Company is entitled to receive in cash its distributive share of the amount which, upon the new appraisal, shall be found to have been the fair selling value of the assets.

In Nos. 62, 63 and 64, decree reversed as to petitioners.
In No. 65, decree modified, and as modified affirmed.